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NO.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

JAMES BLODGETT, Superintendent, *Petitioner*,

v.

KWAN FAI MAK, *Respondent*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED[1]

1. In capital habeas corpus cases, does the *Strickland*[2] test for ineffective assistance of counsel permit reviewing courts to: (a) determine prejudice based upon the possible effect of counsel's errors on one hypothetical juror, (b) compare for proportionality the disparate sentences of co-defendants, and (c) presume that the omission of "humanizing" evidence from the penalty phase of the capital trial was *per se* unreasonable?

2. In order for evidence to be "relevant" under *Lockett v. Ohio*,[3] must the evidence be supported by a foundation sufficiently linking it to a mitigating circumstance?

3. Does this Court's "reasonable likelihood" standard for federal habeas review of jury instructions permit a habeas court to review instructions for "prejudice" or perceived errors of state law, without reviewing the instructions in light of the entire record?

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[1]Although not a basis for the lower court's decision, Petitioner wishes to preserve the issue of the Ninth Circuit's conclusion that certain evidence adduced at the subsequent trial of Respondent's co-defendant Tony Ng "should be admitted during [Respondent's] resentencing." *Mak v. Blodgett*, 970 F.2d 614, 624 n. 16 (9th Cir. 1992). Petitioner is not relying on this subordinate question as a basis for granting the writ of certiorari. However, Petitioner respectfully requests permission to present this issue in the event this Court grants certiorari.

[2]*Strickland v. Washington*, 466 U.S. 668 (1984).

[3]*Lockett v. Ohio*, 438 U.S. 586 (1978).

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, filed on July 16, 1992.

I. OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit in Petitioner's appeal, affirming the district court granting of the writ of habeas corpus in part with respect

to Mak's death sentence, is reported at 970 F.2d 614 (9th Cir. 1992) and appears at Appendix A. The Ninth Circuit's unreported memorandum in Mak's cross-appeal, affirming the district court's denial of the writ of habeas corpus in part, appears at Appendix B. The Ninth Circuit's unreported order denying Petitioner's petition for rehearing with suggestion for rehearing en banc appears at Appendix C. The district court's opinion granting Mak's petition for writ of habeas corpus in part is reported at 754 F. Supp. 1490 (W.D. Wash. 1991) and appears at Appendix D. The United States Magistrate Judge's report and recommendation, later adopted by the district court, appears at Appendix E. The opinion of the Washington Supreme Court affirming Mak's conviction and death sentence on direct appeal is reported at 105 Wn.2d 692, 718 P.2d 407 (1986) and appears at Appendix F.

II. JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on July 16, 1992, and Petitioner's petition for rehearing with suggestion for rehearing en banc was denied on September 25, 1992. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

III. CONSTITUTIONAL AND STATUTORY PROVISIONS

The Sixth Amendment to the United States Constitution provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."

The Eighth Amendment to the United States Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

The Fourteenth Amendment to the United States Constitution provides, in pertinent part: ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law. . . ."

Title 28, Section 2254(a) of the United States Code provides:

> The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

IV. STATEMENT OF THE CASE

A. Facts And Procedural Background In The State Courts.

On the night of February 18, 1983, Kwan Fai "Willie" Mak and his two associates, Benjamin Kin Ng and Wai-Chiu

Tony Ng (no relation), went to the Wah Mee gambling club in Seattle's Chinatown to carry out Mak's longstanding plan to rob a gambling club and eliminate all witnesses by shooting them in the head. All three of the robbers brandished handguns in a threatening manner and ordered the elderly victims to lie on the concrete floor of the club's lower level. Mak calmly remained on the upper level with his gun trained on those below, shouting orders while Ben Ng and Tony Ng hog-tied the victims. As new arrivals entered the club, they were forced to a prone position on the floor and were similarly bound. 7 REC. 2671-74. As they lay bound, Ben and Tony Ng took the victims' wallets, personal property, and cash. 7 REC. 2673.

The three gunmen then put on gloves and stood in the upper level of the club, pointing their guns at the bound and helpless victims below. A barrage of gunfire erupted and at least thirty-two shots were fired, all fourteen of the victims suffering gunshot wounds to the head. When the gunfire stopped, one of the gunmen said, "Is that all the bullets?" 7 REC. 2684.

Miraculously, one of the fourteen victims survived the massacre and later testified at Mak's trial. Sixty-one year old Wai Yok Chin, although shot in the head, bleeding profusely and barely conscious, was able to free himself from his restraints after the gunmen departed and was rushed to the hospital. 7 REC. 2685-86. Twelve victims--Henning Chin, Chin Lee

Law, Moo Min Mar, Jean Mar, Jack Mar, Dewey Mar, Chong Chin, Hung Fat Gee, Gim Wong, Wing Chin, and Wing Wong--were all dead by the time Seattle police officers arrived. John Loui, the thirteenth victim, died at the emergency room. 8 REC. 2756-2812, 2979-3016.

Due to Wai Chin's ability to identify Mak and Benjamin Ng, Seattle police officers arrested Mak and Benjamin Ng within hours of the slayings. Mak was charged by information in the King County Superior Court on February 24, 1983 with thirteen counts of aggravated first degree murder in violation of RCW 9A.32.030(1)(a) and RCW 10.95.020(7),(8),(9), and one count of first degree assault in violation of RCW 9A.36.010(1)(a). 12 REC 4201-08. The prosecutor also filed a notice of intent to seek a special sentencing proceeding to determine whether the death penalty should be imposed. 12 REC 4200.

Mak's trial was held from September 20 through October 5, 1983. "The evidence presented at trial overwhelmingly established that Mak planned, supervised and helped commit the armed robbery and systematic murder in cold blood of 13 human beings to cover up the robbery of an establishment where he was known." *State v. Mak*, 105 Wn.2d 692, 697, 718 P.2d 407, *cert. denied*, 479 U.S. 995 (1986). The jury convicted Mak of all thirteen counts of aggravated first degree murder and one count of first degree assault. 19 REC. 6887-88.

With respect to each of the murder counts, the jury found the presence of two aggravating circumstances: (1) "The defendant and his accomplices committed the murder to conceal the commission of a crime or to protect or conceal the identity of any person committing a crime;" and (2) "The murder was committed in the course of or furtherance of a robbery." 19 REC. 6886.

During the special sentencing proceeding, the defense introduced evidence that Benjamin Ng had received a life sentence[1] and presented expert testimony regarding eyewitness memory. 11 REC. 4119-39. Defense counsel argued, based upon evidence presented at trial, that Mak's background as a young immigrant served as a cultural explanation for his involvement in the crimes. Counsel also pointed to Mak's relative youth and the fact that Benjamin Ng's jury had rejected a death sentence, emphasizing that it was only fair to treat them equally and give Mak a life sentence. 11 REC. 4145-65.

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[1]Benjamin Ng was also convicted at his separate trial of thirteen counts of aggravated first degree murder and one count of first degree assault. However, the jury in his case could not unanimously conclude whether the State had proved an absence of mitigating factors, and he was sentenced to life imprisonment without the possibility of parole. *See State v. Ng*, 104 Wn.2d 763, 713 P.2d 63 (1985). Tony Ng was eventually apprehended in Canada and was subsequently convicted of thirteen counts of first degree robbery and one count of second degree assault. *See State v. Ng*, 110 Wn.2d 32, 750 P.2d 632 (1988).

The jury unanimously determined beyond a reasonable doubt that there were not sufficient mitigating circumstances in Mak's case to merit leniency, and Mak was sentenced to death. 19 REC. 6898. The Washington Supreme Court affirmed Mak's conviction and death sentence on direct appeal, and this Court denied certiorari. *State v. Mak*, 105 Wn.2d 692, 718 P.2d 407, *cert. denied*, 479 U.S. 995 (1986). Mak later filed a personal restraint petition with the Washington Supreme Court, which was denied, and this Court denied certiorari.[2] Vols. 30 and 31 REC.; *Mak v. Washington*, 488 U.S. 871 (1988). Mak subsequently filed a second personal restraint petition, which was also denied by the Washington Supreme Court on September 11, 1989. 32 REC. 10555-10696; 10835-36.

B. Federal Habeas Corpus Review.

On November 8, 1988, Mak filed a federal habeas corpus petition in the United States District Court for the Western District of Washington and sought a stay of his then-pending execution date of November 15, 1988. CR 104. The district court granted a stay and referred the petition to a magistrate judge. CR 11, CR 21. On October 18, 1989, Mak filed a supplemental and amended habeas petition. CR 150.

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[2]A personal restraint petition is a state post-conviction collateral review procedure authorized by the Washington Rules of Appellate Procedure (RAP) 16.3 through 16.15.

The magistrate judge recommended that the district court reject all but a few of Mak's 43 claims, but that the court hold an evidentiary hearing regarding Mak's claims of ineffective assistance of counsel. *See* Appendix E. The district court conducted an evidentiary hearing and, on January 8, 1991, issued an order granting Mak's petition as to his death sentence but otherwise approving and adopting the magistrate's report and recommendation rejecting the remaining claims. *See* Appendix D; *Mak v. Blodgett*, 754 F. Supp. 1490 (W.D. Wash. 1991). The court concluded that Mak had been denied effective assistance of counsel during the penalty phase of his trial, and ordered Mak's death sentence vacated. Mak, 754 F. Supp. at 1502.

Both parties appealed to the United States Court of Appeals for the Ninth Circuit. On July 16, 1992, the Ninth Circuit filed its *per curiam* opinion affirming the district court's decision. *See* Appendix A; *Mak v. Blodgett*, 970 F.2d 614 (9th Cir. 1992).[3] However, the Ninth Circuit granted Mak additional relief concerning the penalty phase of his trial, ultimately concluding that: (1) Mak was denied effective assistance of counsel during the penalty phase due to counsel's

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[3]The Ninth Circuit also issued an unpublished memorandum on that same day in which the court rejected Mak's other habeas claims concerning his trial and death sentence. *See* Appendix B. Thus, only those claims that were resolved adversely to the State were published.

failure to present the testimony of Mak's family members and an expert on Hong Kong culture; (2) the trial court erroneously refused to admit certain evidence offered in mitigation; and (3) the jury instructions were erroneous under Washington law and were prejudicial because they may have misled Mak's jury to believe that unanimous agreement was required before a life sentence could be imposed. *Id.* On September 25, 1993, the Ninth Circuit rehearing. *See* Appendix C.

V. REASONS FOR GRANTING THE WRIT

A. The Ninth Circuit's Revisionist Interpretation of *Strickland v. Washington* Will Significantly Ease A Capital Defendant's Burden of Proving Ineffective Assistance of Counsel.

The Ninth Circuit concluded that a capital defendant meets his burden of proving ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668 (1984) if trial counsel fails to present certain "humanizing" evidence in mitigation. Moreover, the Ninth Circuit eased the capital defendant's affirmative burden by holding that prejudice under *Strickland* should be viewed from the perspective of one hypothetical juror, rather than the entire jury, and the speculative effect that the omitted evidence may have had on that one juror. Further, the Ninth Circuit stretched *Strickland* to inject a proportionality component in its prejudice analysis and compare

the challenged death sentence with the sentence of a co-defendant. None of these concepts has any place under *Strickland*, and this Court should reverse.[4]

1. The Ninth Circuit has violated *Strickland* by assessing prejudice based upon the speculative idiosyncracies of one juror.

This Court concluded in *Strickland* that a demonstration of actual prejudice requires the convicted defendant to show that "counsel's errors were so serious as to deprive the defendant of a fair trial," and that "the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable." *Strickland*, 466 U.S. at 687. Moreover, *Strickland* creates an objective standard, specifically cautioning reviewing courts not to consider the idiosyncracies of the sentencer in assessing prejudice:

> An assessment of the likelihood of a result more favorable to the defendant must exclude the possibility of arbitrariness, whimsy, caprice, "nullification," and the like. . . . It should not depend on the idiosyncracies of the particular decisionmaker, such as unusual propensities

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[4]Perhaps most inexplicable is the Ninth Circuit's affirmance of the district court's ineffectiveness analysis without deciding whether Mak had demonstrated actual prejudice: "We do not need to decide whether [counsel's] deficiencies alone meet the prejudice standard because other significant errors occurred that, considered cumulatively, compel affirmance of the district court's grant of habeas corpus as to the sentence of death." *Mak*, 970 F.2d at 622 (citing pre-*Strickland* Ninth Circuit cases). The *Mak* court made no effort to identify exactly what those "other significant errors" were, nor did the court cite to any post-*Strickland* authority for dispensing with the second prong of the *Strickland* test.

> toward harshness or leniency. Although these factors may actually have entered into counsel's selection of strategies and, to that limited extent, may thus affect the performance inquiry, they are irrelevant to the prejudice inquiry.

Id. at 695 (emphasis added).

The Ninth Circuit nevertheless held that an assessment of *Strickland* prejudice allows reviewing courts to accord dispositive weight to the purely speculative idiosyncracies of one potential "holdout" juror, adopting the Seventh Circuit's "effect-on-one-juror" approach. *Mak*, 970 F.2d at 621 & n. 8 (citing *Kubat v. Thieret*, 867 F.2d 351, 371 (7th Cir.), *cert. denied*, 493 U.S. 874 (1989)). Thus, under the Ninth Circuit's reasoning, a reviewing court is not to evaluate whether a capital defendant's death sentence was the result of a breakdown in the adversary process (as *Strickland* demands) but whether one member of the jury may have voted for a life sentence but for counsel's errors or omissions.

As support for its "effect-on-one-juror" approach, the Ninth Circuit cited the Seventh Circuit's decision in *Kubat*, *supra*, and the court's belief that "*Strickland* does not stand for the proposition that a court cannot consider the effect of counsel's deficient performance on a single juror. . . ." *Mak*, 970 F.2d at 621. However, *Strickland* speaks in terms of the "decisionmaker" and the "sentencer", not individual jurors, and cautions against considering the idiosyncracies of the sentencer in assessing prejudice. If *Strickland* holds that the idiosyncracies

of the decisionmaker are completely irrelevant to determining prejudice, then the purely speculative idiosyncracies of one member of the decisionmaker--the potential holdout juror--are even less relevant.[5]

Nothing in the *Mak* opinion in any way limits the application of the "effect-on-one-juror" approach to capital cases. *Any* jury question that may require unanimity--guilt or innocence, aggravating circumstances, sentencing--is subject to "effect-on-one-juror" scrutiny. In all cases where a less than unanimous jury could prevent or forestall a result adverse to the defendant, the convicted defendant will be invited to argue that his attorney could have avoided that result, invoking the presence of the hypothetical holdout juror. The "effect-on-one-juror" approach is a significant reduction of a defendant's affirmative burden under *Strickland* to prove actual prejudice. Petitioner requests that this Court grant certiorari to reverse the Ninth Circuit's engrafting of this novel approach to the objective *Strickland* standard.

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[5]In the context of analyzing jury instructions, this Court has expressly disclaimed the usage of an "effect-on-one-juror" approach. *See Boyde v. California*, 494 U.S. 370, ___ n. 4, 110 S. Ct. 1190, 1198 n. 4 (1990) (the "reasonable likelihood" standard for analyzing jury instruction claims "better accommodates the concerns of finality and accuracy than does a standard which makes the inquiry dependent on how a single hypothetical 'reasonable' juror could or might have interpreted the instruction").

2. The Ninth Circuit improperly inserted a sentence proportionality review into the *Strickland* prejudice analysis, allowing comparison of sentences of co-defendants.

The Ninth Circuit inserted another invalid component into the prejudice inquiry by holding that reviewing courts may compare the result obtained in the defendant's case with the results of other cases. "Nothing in *Strickland* suggests that a proportionality review is inappropriate when considering prejudicial effect, and the State cites no case law that supports such a notion." *Mak*, 970 F.2d at 621. Mak successfully persuaded the Ninth Circuit and the district court to compare the outcome of Benjamin Ng's trial with the outcome of his own case, and to use that proportionality review in deciding whether he was prejudiced by his attorneys' "errors."

The *Mak* court itself cited no authority for its proposition that the comparison of verdicts by two different juries is appropriate. Moreover, there is no federal constitutional right to comparative proportionality review. *Pulley v. Harris*, 465 U.S. 37 (1984).[6] Under the guise of *Strickland* prejudice analysis, the Ninth Circuit has indirectly granted a type of proportionality review that the Eighth Amendment denies.

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[6]Significantly, the Ninth Circuit in its unpublished memorandum rejected Mak's claim that the different sentences received by Mak and Ng violated the Eighth amendment. *See* Appendix B, pp. 16-17.

Even if a proportionality review is a permissible component of the *Strickland* analysis, such a review should at least be on an accurate basis. Instead, the Ninth Circuit merely assumed that Benjamin Ng's jury had the benefit of "humanizing" evidence that was equally available to *Mak*. *See Mak*, 970 F.2d at 620, 621. However, the record shows otherwise. Ng presented his jury with objective medical evidence of a childhood head injury, claiming that the head injury adversely affected his ability to control his actions. *See* 4 B. Ng REC 1085-1155. Courts have consistently concluded that such evidence is important in mitigation, and counsel's failure to investigate or pursue such evidence may result in a valid ineffectiveness claim.[7]

Unlike Benjamin Ng, Willie Mak had no objectively verifiable psychological or physiological dysfunction to offer as mitigation. Mak's counsel specifically, but unsuccessfully, sought out the type of evidence that apparently proved persuasive to Ng's jury. Even though Ng's mother took the witness stand in the penalty phase of his case, she did not plead for mercy or

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[7] *See Burger v. Kemp*, 483 U.S. 776 (1987) (evidence included defendant's exceptionally unhappy and unstable childhood, including alcohol and drug abuse); *see also Brewer v. Aiken*, 935 F.2d 850 (7th Cir. 1991); *Kenley v. Armontrout*, 937 F.2d 1298 (8th Cir. 1991); *Kennedy v. Dugger*, 933 F.2d 905 (11th Cir. 1991); *Cunningham v. Zant*, 928 F.2d 1006 (11th Cir. 1991); *Loyd v. Smith*, 899 F.2d 1416 (5th Cir. 1990); *Evans v. Lewis*, 855 F.2d 631, 636 (9th Cir. 1988).

describe how Ng was a stellar student, beloved family member or responsible to his parents; Mrs. Ng testified briefly and exclusively about her son's childhood head injuries and bizarre behavior. 4 B. Ng REC. 1085-88. Ng's jury did hear expert testimony, but it was not about how difficult it was for him to assimilate into American society; Ng's experts testified exclusively about his head injuries. 4 B. Ng REC 1089-1155.

A comparison between trials and sentences of co-defendants is not required under the Eighth Amendment, and it is an inappropriate method of assessing *Strickland* prejudice.

3. The Ninth Circuit created a *per se* rule that trial counsel is ineffective if counsel fails to present "humanizing" evidence.

In addition to its failure to properly analyze prejudice under *Strickland*, the Ninth Circuit has established a per se rule of ineffectiveness when counsel fails to present "humanizing" evidence in a capital case. Although referring to *Strickland's* admonition that "[j]udicial scrutiny of counsel's performance must be highly deferential" and the "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance," *Strickland*, 466 U.S. at 689, the *Mak* court actually presumed that the omission of certain types of mitigation evidence is unreasonable. *Mak*, 970 F.2d at 618-19. The Ninth Circuit ignored and paid no deference to trial counsel's investigative efforts and considered judgments at the

time of trial. Instead, the Court seized upon the mitigation package Mak assembled years after trial and assumed that the "new" mitigating evidence would have been only favorable to the defense.

The Ninth Circuit's mode of *Strickland* analysis actually encourages the use of hindsight in evaluating counsel's performance. For example, the Ninth Circuit makes much of counsel's "considered decision" to present evidence of assimilation and cultural problems experienced by Chinese immigrants through local community witnesses rather than a combination of lay and expert witnesses. *Id.* at 619. Instead of deferring to that "considered decision" of trial strategy, the *Mak* court finds fault with the attorneys' failure to present the testimony in the manner that his new attorneys (with the benefit of years of hindsight) may have.

The *Mak* court makes no mention of counsel's investigative efforts and trial strategy, nor does the court acknowledge that counsel were aware of many the items of information Mak has now assembled. That Mak's current mitigation theory (*e.g.*, any evidence, no matter how pedestrian, is mitigating) differs from his former counsel's strategy does not impugn the reasonableness of counsel's strategy. It is not unreasonable for attorneys to focus on only compelling, "high

impact" mitigating evidence to present to a jury that convicted their client of 13 murders.

The *Mak* court's conclusion that there was "no risk" to the defense to presenting Mak's newly-presented mitigation case, *see Mak*, 970 F.2d at 619, is untenable. The court devalued the impact that the prosecutor's cross-examination of Mak's family members (and the prosecutor's closing argument) would have had on their testimony, exposing those witnesses' lack of knowledge about Mak's extensive criminal background and underscoring Mak's manipulative nature.[8]

Despite invoking the *Strickland* standard, the Ninth Circuit ignored *Strickland*'s strong presumption that counsel's actions were reasonable, and specifically employed the type of nondeferential, hindsight-driven scrutiny *Strickland* cautions against employing.

B. The Ninth Circuit Had No Authority To Circumvent The State Courts' Findings Regarding The Insufficiency Of Mak's Offer Of Mitigating Evidence.

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[8]It must be remembered that two of Mak's "loyal" family members (his brother and his teenage nephew, Sonny Kwan) were convicted of tampering with evidence based upon their cleaning out the car Mak used on the night of the murders, a fact that the jury was well aware of from their testimony in the guilt phase. *See* 7 REC 2496; 10 REC 3829-32.

The Ninth Circuit erred by holding that Mak should have been allowed to present irrelevant evidence to the jury about an alleged accomplice named Hing Wong. This Court should grant certiorari because if the Ninth Circuit's opinion stands, the defendant in a capital case will be able to introduce evidence in the penalty phase that has no connection to the circumstances of the crime or the culpability of the defendant. Under the Ninth Circuit's definition of "relevance", prosecutors will be restrained from objecting to defense offers of proof in the penalty phase of capital trials, regardless of how speculative the evidence or how non-existent its foundation.[9]

"Relevance" is a standard that must have some boundaries. No item of evidence is inherently relevant. Relevancy "exists only as a relation between an item of evidence and a matter properly provable in the case." *Huddleston v. United States*, 485 U.S. 681, 690 (1988). The sum of several items of evidence may be greater than any of the single parts standing alone, but the trial court is in the best position to decide whether the jury could reasonably find a relation between the

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[9]It is noteworthy that the Ninth Circuit's version of Mak's offer of proof, and the court's analysis of this claim, is derived exclusively from the *dissenting* opinion of Justice Utter of the Washington Supreme Court. *See Mak*, 970 F.2d at 622, 624. The Ninth Circuit gave no explanation why it adopted the dissent's version of the facts and disregarded the factual conclusions of the Washington Supreme Court majority.

proposed evidence and the matter sought to be proved with that evidence. *Id.* at 689-91.

The Washington Supreme Court summarized Mak's offer of proof at trial and made findings of fact related to the Hing Wong allegations, concluding:

> The trial record reveals that several items that the defendant offered to prove did come to light through the testimony of other witnesses, but failed to support defense counsel's offer of proof. The only connection shown between the alleged "accomplice" and the crimes at the Wah Mee Club was a hearsay statement whereby this claimed accomplice offered to sell Benjamin Ng a bullet-proof vest a week before the crimes were committed at the Wah Mee Club. . . .

State v. Mak, 105 Wn.2d 692, 715-17, 718 P.2d 407 (1986).

These appellate findings of fact are presumed correct on federal habeas corpus review. 28 U.S.C. § 2254(d); *Sumner v. Mata*, 449 U.S. 539 (1981). While the ultimate determination of relevance would be characterized as a mixed question of fact and law, the subsidiary findings of fact are given great deference in federal habeas corpus review. *See Strickland v. Washington*, 466 U.S. 668, 698 (1984). Such findings may be set aside by a federal habeas court only when the findings lack even "fair support in the record". *Marshall v. Lonberger*, 459 U.S. 422, 431-32 (1983).

The trial court record gives full support for the findings of fact made by the Washington Supreme Court. 8 REC. 3047-59; 10 REC. 3591-97; 3769-81; 11 REC. 3854-56, 4098-100; 15

REC. 5236; 19 REC. 6660.[10] The state trial court gave Mak the opportunity to lay a foundation for admissibility of his allegations about Hing Wong. The court directed defense counsel to produce witnesses supporting the allegations, so that a question and answer offer of proof would be the basis for the court's ruling. A question and answer offer of proof is consistent with Washington practice. *See* Washington Rule of Evidence (ER) 103(b); *see also Mad River Orchard, Inc. v. Krack*, 89 Wn.2d 535, 573 P.2d 796 (1978).[11]

Steve Chin was the only witness to testify specifically in support of the defense offer of proof. 10 REC. 3767-86. Chin testified that he overheard comments by Hing Wong while he was having lunch with Hing, Ben Ng and Andy Wong, one and a half years before the Wah Mee murders. 10 REC. 3769-75. During this lunch with Hing, Ben and Andy, Chin heard Hing Wong mention that he wanted to control gambling in Chinatown by "showing muscle" and getting a monthly payment from gambling houses. There was no talk about forcible robbery or

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[10]This offer of proof was made during the guilt phase, and relied on for the proffer of evidence in the penalty phase. 11 REC. 4096. Although Mak showed a connection between Hing Wong and Benjamin Ng, he completely failed to establish any link between Hing Wong and the Wah Mee Massacre.

[11]The State would have stipulated to written rather than oral testimony by Jackey Wong but the trial court insisted on a question and answer offer of proof. 10 REC. 3597-98. 3783; 14 REC. 2048-56. The trial court wished to resolve disagreement about precise testimony of the witnesses. 10 REC. 3783.

causing physical harm to anyone, and Chin said that he did not hear anything more about the subject after this 1980 lunch. *Id.* at 3773-75.

Regarding the bullet proof vest, defense counsel explained to the court that a proffered statement by Eric Yu regarding an alleged offer by Hing Wong to sell Ben Ng a bullet-proof vest was being offered to prove that it was Ng, not Mak, who did the shooting at the Wah Mee.[12] Defense counsel intended to use Ng's comment to Hing Wong (overheard by Eric Yu) in declining to purchase the vest, "I shoot people, they don't shoot me", to convince the jury that Mak did none of the shooting; defense counsel did not mention the "mental state" argument. 11 REC. 3854-57.

As to Mak's allegation that Ng was in contact with Hing Wong on the day of the Wah Mee murders, the actual testimony at trial revealed only that a car "thought" to be Ng's was seen a block away from Hing Wong's restaurant, two or three hours before the Wah Mee crimes began. 10 REC. 3666-69. With respect to the alleged contact between Ben Ng and Hing Wong that evening, there was no such testimony from Kwok Chung Luis who testified that he dined with Ng at Hing Wong's restaurant. 9 REC. 3346-48. Likewise, Mak's allegations that

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[12]This is an aberration: why would Hing Wong *sell* a bullet proof vest to his accomplice if Mr. Wong actually was directing the Wah Mee murders?

Hing Wong made it a practice to cultivate young Chinese men to shoot rival gang members had only speculative support. 2 REC. 473-95 (testimony of Lt. Holter concerning contact with anonymous informant); 8 REC. 3057-59 (attorney Madsen makes representation about proposed testimony of Jackey Wong and Tat Bun Bg).

The state trial court and Washington Supreme Court relied on RCW 10.95.060(3), the portion of Washington's capital punishment statute that requires admission at the penalty phase of "any relevant evidence which it deems to have probative value regardless of its admissibility under the rules of evidence . . . ." The Washington Supreme Court has interpreted "any relevant evidence" to apply only to mitigating evidence, and not to aggravating evidence. *State v. Bartholomew*, 101 Wn.2d 631, 645, 683 P.2d 1079 (1984).[13] This lenient construction of state law was relied on by the Washington Supreme Court when it held that "[Mak's] proffered evidence in this regard was neither relevant nor probative." *State v. Mak*, 105 Wn.2d at 718.

Under the reasoning of this Court in *Huddleston v. United States*, *supra*, Mak's evidence concerning activities of

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[13]Washington law is consistent with this Court's Eighth Amendment decisions that a defendant accused of capital murder has a federal constitutional right to present evidence in mitigation of punishment during the penalty phase if the proffered evidence is both relevant and mitigating. *Lockett v. Ohio*, 438 U.S. 586, (1978); *Eddings v. Oklahoma*, 455 U.S. 104, (1982); *Skipper v. South Carolina*, 476 U.S. 1.

Hing Wong was irrelevant to any matter in mitigation. The state trial court, the Washington Supreme Court, and the district court were therefore justified in holding that the offer of proof was irrelevant and non-probative of any mitigating matters, and therefore the evidence was not admissible in the penalty phase.

In Mak's case, the trial court and the Washington Supreme Court determined that the offer of proof by which Mak attempted to show Hing Wong's involvement in the Wah Mee Massacre was neither relevant nor probative, even under the relaxed evidentiary rule of RCW 10.95.060(3) and *State v. Bartholomew*. *See* 11 REC. 4098-100; *State v. Mak*, 105 Wn.2d at 718. Mak's irrelevant, nonprobative offer of proof also failed to meet the relevancy requirements of *Lockett v. Ohio*, *Eddings v. Oklahoma* and *Skipper v. South Carolina*. Unlike the situation in *Skipper*, where the state trial court did not apply state rules of evidence in an even-handed manner, the Washington trial court and supreme court fairly applied RCW 10.95.060(3) and *State v. Bartholomew*.

Mak simply did not lay a foundation to establish any link between Hing Wong and the Wah Mee Massacre. Without relevant, probative evidence, Mak had no federal constitutional right to present his allegations about Hing Wong as a mitigating circumstance. The Ninth Circuit's error was in its blithe adoption of the dissenting views of the Washington Supreme

Court, enabling the Ninth Circuit to assume that Mak had actual *evidence*, as opposed to a *theory* of mitigation. The Court of Appeals' decision should be reversed.[14]

C. The Ninth Circuit's Method Of Analyzing Jury Instructions Invites Habeas Courts To Parse Jury Instructions In Artificial Isolation And To Disregard Their Context In Light Of The Trial Record.

The Ninth Circuit erroneously concluded that the penalty phase jury instructions given in Mak's case violated the Constitution. In the court's view, the instructions were "prejudicial" and contained an erroneous statement of Washington State law, supposedly informing the jury that unanimous agreement was required before a life sentence could be imposed. The Ninth Circuit reached this conclusion only by ignoring this Court's familiar and well-established rules and by

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[14]In an oblique footnote, the Ninth Circuit ruled that certain testimony from the subsequent trial of Tony Ng must be admitted into evidence at Mak's resentencing. *Mak*, 970 F.2d at 624 n. 16. Although Mak argued that Tony Ng's testimony was newly discovered evidence, the Ninth Circuit did not analyze the evidence under *Townsend v. Sain*, 372 U.S. 293 (1963). The court merely accepted Mak's argument without any legal analysis in a gratuitous, conclusory footnote. Actually, Tony Ng's testimony firmly establishes that Mak planned the Wah Mee murders and enlisted Tony Ng's assistance by threats to kill him, his family, his girlfriend, and by threats to burn down the Ng family restaurant. 7 T. Ng REC. 2186-2205. This Court should grant review and reverse because Tony Ng's testimony does not bear on the constitutionality of Mak's sentencing nor would it have changed the result.

parsing the language of the instructions in a legal vacuum. This Court should reverse.[15]

In assessing the constitutionality of challenged jury instructions, this Court has repeatedly invoked the now "familiar rule" of construction: a jury instruction may not be viewed in artificial isolation but must be considered in the context of the instructions as a whole and the entire trial record. *Estelle v. McGuire*, ___ U.S. ___, ___, 112 S. Ct. 475, 482 (1991); *Boyde v. California*, 494 U.S. 370, ___, 110 S. Ct. 1190, 1196 (1990); *Cupp v. Naughten*, 414 U.S. 141, 147 (1973). It is not enough that a challenged instruction is "undesirable, erroneous, or even 'universally condemned'." *Cupp v. Naughten*, 414 U.S. at 146. Before a federal habeas court may grant relief, the court must determine "'whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way' that violates the constitution." *McGuire*, *supra* (quoting *Boyde v.*

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[15]It is not entirely clear whether the Ninth Circuit actually concluded that Mak was entitled to habeas relief from his death sentence based upon the "prejudicial" or "erroneous" instructions. *See Mak*, 970 F.2d at 625 ("We need not decide, however, whether in this case the prejudice would be sufficient in itself to require resentencing"). Thus, in the Ninth Circuit's view, Mak is entitled to habeas relief based upon the instructional "error" only if that "error" is combined with other, unidentified errors. However, an insufficient habeas claim does not become a meritorious claim simply by aggregating a number of alleged errors, and 28 U.S.C. § 2254 does not authorize federal courts to grant habeas relief based upon "almost errors." The Ninth Circuit's flawed view of its habeas powers warrants review by this Court.

California, supra).[16] The context in which the instructions must be considered includes the charge as a whole, the evidence presented to the jury, and the arguments of counsel. *Boyde*, 110 S. Ct. at 1199-1201.

Moreover, federal habeas relief is unavailable for perceived errors of state law (such as whether a jury instruction complies with state law), and it is not the province of federal courts to reexamine state court conclusions regarding matters of state law. *Estelle v. McGuire*, 112 S. Ct. at 480, 481-82. Federal habeas review is limited to deciding whether the petitioner is in custody in violation of the Constitution, laws, or treaties of the United States. 28 U.S.C. § 2254(a).

The Ninth Circuit has dispensed with the settled rules concerning both the scope of federal habeas authority and the review of state court jury instructions. The *Mak* court decided that the jury instructions given during the penalty phase of Mak's trial, particularly Instruction no.6,[17] misstated Washington law by allegedly informing the jury that it must be unanimous in order to impose a life without parole sentence. The *Mak* court

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[16]As this Court made clear in *Estelle v. McGuire*, the "reasonable likelihood" standard from *Boyde* is the settled, single standard of review for jury instructions. *See Estelle v. McGuire*, 112 S. Ct. at 482 n.4 (discussing and disapproving other standards that considered "how reasonable jurors could have" or "a reasonable juror would have" understood an instruction).

[17]The penalty phase jury instructions and the sentencing verdict form are set out in their entirety in Appendix G.

reached this conclusion without citation to *McGuire*, *Boyde*, or *Naughten*, without any discussion of the trial record, and without even acknowledging that its state law conclusion differed from that of the Washington Supreme Court.

Had the Ninth Circuit bothered to analyze Mak's jury instructions in context and without parsing their language, the court would have concluded, as did the Washington Supreme Court and the district court, that there was no error in the instructions.[18] Instruction no. 6 (the instruction the Ninth Circuit concluded was erroneous) informed the jury how to complete its special verdict form, a form that gave the jury three possible answers to the special interrogatory posed to them during the penalty phase: (1) "yes" (death sentence); (2) "no" (life imprisonment without possibility of parole); or (3) "unable to unanimously agree" (life imprisonment without possibility of parole). Instruction no. 6 merely stated that the "yes" and "no" options on the verdict form required unanimity. The third option--"unable to unanimously agree"--by its very terms did not require unanimity and thus required no further explanation.

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[18]The *Mak* court nevertheless observed that "[t]here is *no question* that challenged instruction number 6 was an erroneous statement of the law." *Mak*, 970 F.2d at 625 (emphasis added).

The Washington Supreme Court, "the ultimate expositors of [Washington] state law",[19] reviewed Mak's penalty phase instructions and found no error or misstatement of state law. *State v. Mak*, 105 Wn.2d 692, 754-58, 718 P.2d 407, *cert. denied*, 479 U.S. 995 (1986). The Ninth Circuit had no authority to disregard the considered judgment of the State's highest court on an issue of state law.

Even more egregious is the Ninth Circuit's abandonment of the "reasonable likelihood" test for reviewing jury instructions in favor of a novel (and vague) "prejudice" standard from *Kubat v. Thieret*, 867 F.2d 351 (7th Cir.), *cert. denied*, 493 U.S. 874 (1989), a pre-*Boyde case*.[20] The Ninth Circuit provided no

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[19]*Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975).

[20]The *Mak* court's heavy reliance upon the "prejudice" standard from *Kubat* is particularly inappropriate because the passage from the *Kubat* opinion quoted at length in *Mak* concerns the *Kubat* court's analysis of an *ineffective assistance of counsel claim*. *See Kubat*, 867 F.2d at 371 (quoted in *Mak*, 970 F.2d at 625). *Strickland v. Washington*, 466 U.S. 668 (1984), of course, includes a "prejudice" component in its test for analyzing ineffective assistance claims. However, none of this Court's many decisions regarding jury instructions discusses jury instructions in terms of the possibility of "prejudice" to the defense. The *Mak* court also relied upon *Mills v. Maryland*, 486 U.S. 367 (1988), a pre-*Boyde* case that dealt with penalty phase jury instructions that precluded the jury's consideration of mitigating factors unless those mitigating factors were unanimously found to exist. But Mak's jury was given no such instruction, and the *Mak* court does not explain how *Mills* applies in any way to Mak's case. Finally, the *Mak* court cited *Kordenbrock v. Scroggy*, 919 F.2d 1091, 1109-10 (6th Cir. 1990) (en banc), *cert. denied*, 111 S. Ct. 1608 (1991). However, the passage from *Kordenbrock* cited in *Mak* constitutes the minority opinion of only four judges of the Sixth Circuit, and the remaining nine judges of the en banc court actually rejected that portion of the four-judge opinion. *See Kordenbrock*, 919 F.2d at 1120-21 (Kennedy, J., dissenting, with eight judges concurring in part IV).

explanation for ignoring the "reasonable likelihood" test, nor did the court provide any guidelines for its "prejudice"test.

The Ninth Circuit could not have reached the conclusion it reached if it had followed the "reasonable likelihood" approach from *Boyde* and *McGuire*. Mak's jury was well aware that it could impose a life sentence and that a less than unanimous verdict was a perfectly permissible one: "If you answer 'yes', the sentence will be death. If you unanimously answer 'no', *or if you are unable to agree on a unanimous answer*, the sentence will be life imprisonment without possibility of parole." *See* Appendix G-5 (Instruction no. 3) (emphasis added). The sentencing verdict form itself (Appendix G-10) expressly informed the jury of its nonunanimous verdict option, and Mak's jury had received as a defense exhibit the nonunanimous verdict form from the Benjamin Ng trial. Defense counsel's closing argument repeatedly emphasized that any one of the jurors could prevent a death sentence from being imposed.[21]

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[21]*See, e.g.*, 11 REC 4151-52 ("everyone of you has the right to spare him and everyone of you can spare him on your own"); 4158 ("each have the independent right, individually, each of you, to spare his life. It's not a group decision, it's an independent decision"); *id.* ("It's a personal question. And it takes each and every one of you to impose it"); 4159 ("you each got to make a conscience decision whether or not to exercise your privilege to extend mercy"). *See also* 11 REC 4155-56 ("we've submitted to you Ben Ng's verdict, the jury in his case having found him guilty of thirteen aggravated murders and one count of assault in the first degree, just as you have done, spared his life. They couldn't reach a decision. He's going to spend the rest of his life in prison").

Considered in light of the entire record, there is no reasonable likelihood that Mak's jurors interpreted their instructions in the manner that the Ninth Circuit did. The Ninth Circuit's decision in *Mak* constitutes an abandonment of the "reasonable likelihood" standard, the "single standard of review for jury instructions" *See McGuire*, 112 S. Ct. at 482.[22] This Court should grant review, reverse the Ninth Circuit, and reaffirm *Boyde* and *McGuire*.

VI. CONCLUSION

For the reasons stated above, Petitioner respectfully prays that this Court grant certiorari and reverse the decision of the Ninth Circuit.

Respectfully submitted,
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[22]The Ninth Circuit rejected two other challenges to Mak's penalty phase jury instructions after applying the "reasonable likelihood" standard and specifically citing to *Estelle v. McGuire*, *supra* and *Cupp v. Naughten*, *supra*. *See* Appendix B. Curiously, however, the *Mak* court chose not to publish that disposition, which means that the unpublished memorandum (employing the "reasonable likelihood" standard) "shall not be regarded as precedent and shall not be cited" in future Ninth Circuit cases. *See* Ninth Circuit Rule 36-3; *see also* Appendix B-1 n.*

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NOS. 91-35256
and
91-35615
D.C. NO. CV-88-1421-WD

OPINION

Kwan Fai Mak,

Petitioner-Appellee-Cross-Appellant,

v.

James Blodgett, Superintendent, Washington State Penitentiary at Walla Walla,

Respondent-Appellant-Cross-Appellee.

Appeal from the
United States District Court
for the Western District of Washington
William L. Dwyer,
District Judge, Presiding

Argued and Submitted
March 24, 1992–San Francisco, California

Filed July 16, 1992

Before: James R. Browning,
Thomas Tang, and
Thomas G. Nelson, Circuit Judges.

Per Curiam

SUMMARY

INDIVIDUAL RIGHTS/CONSTITUTIONAL RIGHTS/CRIMINAL LAW AND PROCEDURE/RIGHT TO COUNSEL/EVIDENCE/HABEAS CORPUS

Affirming a district court judgment denying habeas relief on appellant's conviction for murder, and also affirming the grant of habeas relief with regard to appellant's sentence, the court of appeals held that appellant had indeed received ineffective assistance of counsel during the penalty phase of his trial by counsel's failure to introduce mitigating circumstances meriting leniency from the death penalty.

Appellant Kwan Fai Mak was convicted in Washington state court of murder and aggravated assault and sentenced to death. Also convicted on the same charges, although sentenced to life in prison without parole as a result of mitigating evidence introduced during the penalty phase of his trial, was codefendant Ben Ng. A third accomplice, Tony Ng fled the country. At the penalty phase of Mak's trial, essentially no mitigating evidence was presented. The jury thus found that the state had proven the absence of mitigating factors and sentenced Mak to death. After exhausting his state court remedies, Mak unsuccessfully filed a petition for federal habeas relief concerning his conviction. However, the district court granted the relief requested on Mak's

claim that he received ineffective assistance of counsel during the penalty phase of his trial. Both the state and Mak appealed.

[1] The court noted that in prior Supreme Court and Ninth Circuit cases dealing with failure to admit mitigating evidence where performance has been found reasonable, counsel involved had consciously decided not to present mitigating evidence because of reasonable tactical evaluations--specifically, counsel determined that the evidence would have opened the door to damaging rebuttal evidence. [2] By contrast, in this case, the district court properly found that Mak's counsel made no such tactical evaluation in their failure to introduce evidence of mitigating circumstances meriting leniency for Mak from the death penalty, and that no risk would have been incurred by presenting the proffered evidence. The district court's finding of fact was sufficiently supported by the record. [3] Although counsel's errors were not as egregious as those in some prior cases, the court found that Mak's defense counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. Absent tactical purpose or risk, such performance was deficient within the meaning of *Strickland*.

[4] The district court correctly agreed with Mak that there was a reasonable probability that the addition of evidence concerning mitigating circumstances would have changed the result in sentencing. [5] The court rejected the state's argument

that the district court's prejudice analysis was flawed. The state's argument that the district court erred in considering the effect of the proffered evidence on only one juror rather than the collective jury was meritless. [6] *Strickland* does not stand for the proposition that a court cannot consider the effect of counsel's deficient performance on a single juror, but rather that the court cannot consider the possibility that a juror would render a decision not based on the law, but based on that juror's idiosyncrasies. In addition, the effect-on-one juror approach comports with Washington death penalty law allowing any one juror to set aside the death penalty. [7] In addition, the court rejected the state's argument that by comparing the life-without-parole result of the Ben Ng trial where the jury heard humanizing evidence at the penalty phase with the death penalty result of the Mak trial where the jury did not have the benefit of humanizing evidence, the district court improperly inserted a proportionality review into the *Strickland* analysis. [8] Nothing in *Strickland* suggests that a proportionality review is inappropriate when considering prejudicial effect, and the state cited no case law to support such notion. [9] However, the court did not need to decide whether the alleged deficiencies alone met the prejudice standard of *Strickland* because other significant errors occurred that, considered cumulatively, compelled

affirmance of the grant of habeas corpus as to the sentence of death.

[10] The court agreed that the refusal of the trial court to admit at the penalty phase circumstantial evidence from which it might be inferred that Mak's codefendant, Ben Ng, and a third party, rather than Mak, may have planned the murders in question was an error of constitutional magnitude since the information was central to the sentencing issue. [11] Mak had a constitutional right to present all relevant mitigating evidence related to his character or the circumstances of the offense at the sentencing phase of his trial. [12] In addition, the court noted that the Supreme Court has held that, where the underlying statute does not require unanimity, due process will not tolerate jury instructions that could reasonably be interpreted by a jury to preclude consideration of any mitigating factor unless such factor was unanimously found to exist.

COUNSEL

Kathryn Lund Ross, Jones, Ross, Besman & Connolly, Lynnwood, Washington; John Midgley, Evergreen Legal Services, Seattle, Washington, for the petitioner-appellee-cross-appellant.

Paul D. Weisser, Assistant Attorney General, Olympia, Washington, for the respondent-appellant-cross-appellee.

OPINION

PER CURIAM:

I

OVERVIEW

Kwan Fai ("Willie") Mak was convicted of murder and aggravated assault and sentenced to death in a Washington court. He subsequently filed this federal habeas corpus petition challenging the constitutionality of both his conviction and his sentence. The district court denied relief with regard to his conviction, but granted the writ with regard to his sentence, finding that Mak had received ineffective assistance of counsel during the penalty phase of his trial.[1] Both sides appealed. We affirm on both appeals. We also conclude additional errors occurred requiring resentencing.

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[1] *Mak v. Blodgett*, 754 F. Supp. 1490 (W.D. Wash. 1991).

II

FACTS

In the early morning hours of February 19, 1983, three young men entered the Wah Mee gambling club in the Chinatown section of Seattle, tied and robbed fourteen patrons and employees of the club, and shot them. Thirteen victims died. Wai Chin survived and became the key prosecution witness.

The King County Prosecuting Attorney filed an information charging petitioner and codefendant Ben Ng with murder and aggravated assault. The third gunman, Tony Ng (no relation to Ben), fled the country.

Ben Ng was tried first and convicted. Mitigating evidence was introduced during the penalty phase of his trial. The jury held the state had not proven beyond a reasonable doubt there were no mitigating circumstances meriting leniency. Ben Ng was therefore sentenced to life in prison without parole.[2]

Mak was tried second and also convicted. Essentially no mitigating evidence was presented during the penalty phase of his

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[2]Under Washington law, as outlined below, see page ___, if a defendant is found guilty of aggravated first degree murder, the presumptive sentence is life without possibility of parole. This presumption can be overcome and the death penalty imposed only if the jury unanimously finds no sufficiently mitigating circumstances warranting leniency. Wash. Rev. Code §§ 10.95.060(4); 10.95.080(1).

trial. The jury found that the state had proven the absence of mitigating factors and therefore sentenced Mak to death.

Tony Ng was captured in Canada after Mak had been tried and sentenced. Canadian authorities permitted extradition only on the condition the state would not seek the death penalty. Tony Ng was convicted and sentenced to seven consecutive life terms.

III

PROCEDURAL HISTORY

Mak appealed his conviction and death sentence to the Washington Supreme Court, which affirmed by a 7-2 vote.[3] Mak filed a personal restraint petition, which was also denied by the Washington Supreme Court. Mak then filed a federal habeas petition. The petition was referred to a magistrate. In due course the magistrate recommended denial of all but 3 claims.

The district court held an evidentiary hearing to explore two claims that Mak had received ineffective assistance of counsel during the penalty phase, and inspected certain materials *in camera* to resolve a third claim that the materials should have been revealed pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963).

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[3]*State v. Mak*, 718 P.2d 407 (Wash. 1986).

The district court held Mak had received ineffective assistance of counsel during the sentencing phase because of counsel's failure to introduce significant available mitigating evidence. The court found no *Brady* violation and agreed with the magistrate that Mak's remaining claims were meritless. The court denied relief as to Mak's conviction but granted relief as to sentencing.

IV

STANDARD OF REVIEW

The decision whether to grant or deny a petition for habeas corpus is reviewed de novo. *United States v. Popoola*, 881 F.2d 811, 812 (9th Cir. 1989). "To the extent it is necessary to review findings of fact, the clearly erroneous standard applies." *Norris v. Risley*, 878 F.2d 1178, 1180 (9th Cir. 1989). Under the clearly erroneous standard, we must accept the lower court's findings of fact unless we are left with the definite and firm conviction that a mistake has been committed. *Dollar Rent A Car of Washington, Inc. v. Travelers Indemnity Co.*, 774 F.2d 1371, 1374 (9th Cir. 1985).

V

DISCUSSION

A. GUILT PHASE ISSUES

Mak raises several issues in his cross-appeal dealing with the guilt phase of his trial: exclusion of evidence implicating a third party in the murder; limitation on cross-examination of two prosecution witnesses; admission of damaging hearsay; newly discovered evidence; prosecutorial misconduct in closing argument; failure to require jury unanimity; and denial of access to *Brady* materials. We affirm the district court's conclusion there was no merit to these claims in a separate, unpublished disposition filed with this opinion.

B. PENALTY PHASE ISSUES[4]

1. INEFFECTIVE ASSISTANCE OF COUNSEL

Background

Mak was represented at trial by court-appointed counsel three and four years out of law school, respectively. Neither had

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[4]A number of other issues relating to the penalty phase raised by Mak in his cross-appeal are dealt with in the memorandum disposition: that the prosecutor made improper comments during the penalty phase; that the disparity in the sentences received by Ben Ng and Mak violated Mak's eighth amendment rights; and that penalty phase jury instructions unconstitutionally limited the jury's consideration of mitigating factors and permitted consideration of aggravating factors.

experience in a capital defense, although both had taken felony cases to trial.

Although the case against Mak was filed in February 1983, the attorneys were not appointed until May, when prior counsel withdrew. For the next five months, each attorney devoted nearly ninety hours a week to case preparation, spending most of their time developing evidence that an unindicted individual, one Hing Wong, actually planned the massacre with co-defendant Ben Ng, and that Mak was an unwitting participant.

Defense counsels' strategy at the penalty phase was to present evidence of Hing Wong's involvement that had been excluded during the guilt phase. They assumed this evidence would be admitted in the penalty phase because of the lower evidentiary standard. They were wrong; the trial court not only excluded the evidence, but denied defense counsels' informal request for a recess to permit them to assemble other penalty phase evidence. 754 F. Supp. at 1501. They made no record of the request, and did not preserve an objection. Defense counsel were compelled to commence the sentencing trial essentially unprepared only a few hours after return of the guilty verdict. *Id.* at 1496, 1501.

The only mitigating evidence presented during the sentencing proceeding was expert testimony questioning the reliability of the eyewitness' memory, and a copy of the jury

verdict sentencing Ben Ng to life without possibility of parole. Defense counsel failed to present any mitigating evidence regarding Mak's background, family relationships or cultural dislocations that might have affected his behavior. *Id.* at 1501. The district court found there was "substantial and important mitigating evidence readily available," including testimony of family members to show Mak's human qualities, and expert testimony of Dr. Graham Edwin Johnson to show the effects of cultural conflict on young Chinese immigrants. *Id.* at 1496, 1499, 1501.[5] However, Mak's attorneys did not invite Mak's

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[5]Family members would have testified that

> [Mak] was the beloved youngest son of a traditional Chinese family; that he had been a good student and dutiful son in Hong Kong; that after coming to this country he did well in citizenship, and in some school subjects, for the first few years; that he worked and gave money to the family; that he helped his parents in other ways; that he was kind to other members of the extended family; and that he was a "favorite uncle" to young nieces and nephews.

Id. at 1496.

> The expert testimony of Dr. Johnson would have discussed serious assimilation problems experienced by many Chinese who are moved during adolescence from Hong Kong to North America, and certain values in the Chinese culture of Hong Kong which could help to explain petitioner's involvement in criminal activities here. [The testimony] would also suggest that petitioner's apparent lack of emotion at trial did not necessarily indicate disinterest or coldness, but was consistent with cultural expectations of Chinese males.

Id. at 1499.

family to testify at trial. *Id.* at 1500. As Mak's mother testified at the district court's evidentiary hearing, "I was never asked [to go to the trial]. If I was asked, I certainly would go. I didn't know. If they had asked, I would go with my husband, for sure, as a couple. . . . If I had to roll on the floor to go, I would roll on the floor to go." *Id.* at 1497.

The district court noted that defense counsels' failures were understandable because of their inexperience, the limited preparation time available to them after a belated appointment, the intense media focus and their concentration on the guilt phase. However, the court held such failure deprived Mak of his Sixth Amendment right to effective assistance of counsel. *Id.* at 1501.

In *Strickland v. Washington*, 466 U.S. 668, 678, 687 (1984), a case, like *Mak*, in which petitioner sought reversal of a death penalty conviction based on trial counsel's failure to present certain mitigating evidence during the sentencing proceedings, the Supreme Court established a two-part test to determine when the Constitution requires a criminal judgment be overturned because of ineffective assistance of counsel: (1) *deficiency* of trial counsel's performance, and (2) a showing that the deficient performance *prejudiced* the defense.

Deficiency of Performance

To prove deficiency of performance, the defendant must show counsel made errors so serious that performance fell below an objective standard of reasonableness under prevailing professional norms. *Id.* at 687-88. "Judicial scrutiny of counsel's performance must be highly deferential. . . . [requiring] that every effort be made to eliminate the distorting effects of hindsight . . . . and [demanding] a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance . . . . " *Id.* at 689. "[T]he defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Id.* (quoting *Michel v. Louisiana*, 350 U.S. 91, 101 (1955)).

[1] In prior Supreme Court and Ninth Circuit cases dealing with failure to admit mitigating evidence where performance has been found reasonable, the attorneys had consciously decided not to present mitigating evidence because of reasonable tactical evaluations--specifically, they determined

the evidence would have opened the door to damaging rebuttal evidence.[6]

[2]By contrast, in the present case, the district court found Mak's counsel made no such tactical evaluation, and no risk would have been incurred by presenting the proffered evidence. 754 F. Supp. at 1501. The court's finding of fact was sufficiently supported by the record. For example, Mak's attorney testified that he did not make a conscious decision to omit humanizing evidence, and did not feel that such evidence would have opened the door to detrimental rebuttal evidence.

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[6]See Strickland, 466 U.S. at 699 (decision not to present testimony of family members or psychological evaluations was a reasonable strategic choice because evidence: (1) would have been of little help; (2) would have opened door to damaging evidence of defendant's criminal history, and (3) was unnecessary because the judge had already heard at plea colloquy the substance of defendant's financial and emotional troubles); *Burger v. Kemp*, 483 U.S. 776, 791-94 (1987) (failure to present any mitigating evidence, including defendant's own testimony or testimony of defendant's mother that he had an exceptionally unhappy and physically abusive childhood, or expert psychological testimony, was reasonable professional judgment because the testimony would have shown defendant's unremorseful attitude, violent tendencies which were at odds with the defense strategy, and his prior criminal acts); *Campbell v. Kincheloe*, 829 F.2d 1453, 1462-63 (9th Cir. 1987) (failure to present any mitigating evidence, including that defendant's father was an alcoholic; defendant was the victim of child abuse, suffered from various medical problems as a child, had a history of drug and alcohol abuse, had attempted suicide; and was the father of two children, was reasoned strategic choice because it would have opened the door to evidence that he forcibly raped his ex-wife, repeatedly raped fellow inmates, was involved in drug-and alcohol-induced violence, and was involved in sexually abhorrent conduct with children and animals), *cert. denied*, 488 U.S. 948 (1988); *Harris v. Vasquez*, 949 F.2d 1497, 1525 (9th Cir. 1990) (failure to present psychiatrists to rebut damaging testimony of the government's psychiatric expert was competent assistance because: (1) a psychiatric defense theory would conflict with his alibi defense, (2) testimony would open the door to equally persuasive psychiatric opinions that reached a different conclusion), *cert. denied*, 112 S. Ct. 1275 (1992).

Id. at 1500. And while both attorneys agreed it was their considered decision to present cultural conflict testimony in the guilt phase through local community members, Robinson testified there was no reason not to have presented both lay and expert witnesses. *Id.*

[3] Because of the potential consequences of deficient performance during capital sentencing, we must be sure not to apply a more lenient standard of performance to the sentencing phase than we apply to the guilt phase of trial. As the district court noted, "[t]he issue for the jury is whether the defendant will live or die. . . . The sentencing hearing is defense counsel's chance to show the jury that the defendant, despite the crime, is worth saving as a human being. . . . To fail to present important mitigating evidence in the penalty phase--if there is no risk in doing so--can be as devastating as a failure to present proof of innocence in the guilt phase." *Id.* Although counsel's errors were not as egregious as those in some prior cases,[7] we find that

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[7] *See, e.g., Deutscher v. Whitley*, 884 F.2d 1152, 1159-61 (9th Cir. 1989) (defense attorney had knowledge of facts that should have led to investigation of highly mitigating evidence, such as mental health records showing defendant had been diagnosed as schizophrenic with organic brain damage, had been committed to mental hospitals, had sought but not received psychiatric care for uncontrollable outbursts, and family testimony that defendant was regularly beaten by his father and had suffered fetal injury due to a beating his mother received from his father); *Evans v. Lewis*, 855 F.2d 631, 636-37 (9th Cir. 1988) (counsel had pre-sentence report referring to defendant's two previous incarcerations in mental institutions (mental impairment was a mitigating factor under state law), but failed to present any mitigating evidence, even though under state law, failure to offset aggravating factors invokes a mandatory death sentence).

Mak's defense counsels' performance fell below an objective standard of reasonableness under prevailing professional norms. Mak's defense counsel never placed Mak in the community nor portrayed Mak as a human being who was a devoted son with family members who loved him. Mak was depicted by the prosecution as a killing machine, and the defense presented no humanizing evidence whatsoever to offset that picture. Absent tactical purpose or risk, such performance is deficient within the meaning of *Strickland*.

Prejudice to Defense

To meet the prejudice prong of the *Strickland* test, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have different." *Strickland*, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* The reviewing court "must consider the totality of the evidence before the judge or jury." *Id.* at 695. In considering the totality of the evidence, the *Strickland* Court adopted a balancing test that weighs the aggravating and mitigating circumstances. The Court stated:

> When a defendant challenges a death sentence . . . the question is whether there is a reasonable probability that, absent the errors, the sentencer--including an appellate court, to the extent it independently reweighs the evidence--would have concluded that the balance of

> aggravating and mitigating circumstances did not warrant death.

Id. at 695.

The State, applying the balancing test, argues that Mak was not prejudiced by defense counsels' performance because the guilt phase evidence was overwhelmingly damaging while the proffered mitigating evidence was insubstantial. The State first sets forth the aggravating evidence: the massacre of thirteen innocent individuals; eyewitness testimony that pointed to Mak as the leader; eyewitness testimony that Mak held a gun on helpless victims; the survivor's description of being hog-tied; Mak's testimony that he could easily forgive Ben Ng for an unrelated incident in which Ng shot and killed an innocent jogger; and Mak's testimony that he was not involved in the massacre when the survivor placed him there. The State then attacks the mitigating value of the proffered evidence: evidence that Mak came from a loving family background would have the negative effect of showing there was no comprehensible reason for Mak to have gone astray; testimony of Mak's family members would have shown that they knew little of Mak's criminal life, thereby painting him as a manipulator and a liar; school records showing that Mak received honor roll grades and awards for service and citizenship in junior high school would belie Mak's assertion that he had a difficult time adjusting to life

in America; expert cultural conflict testimony might have been unfavorably perceived by the jury as an argument for cultural exemption from the death penalty; and Dr. Johnson's testimony that all immigrant groups faced similar problems might have deflated any theory that Mak was the product of unique cultural circumstances.

Mak responds that the evidence of Mak's loving family, his role as a dutiful son, brother and uncle would have been compelling because the jury would regard Mak as a person of worth if they saw his family standing up for him and knew that he was helpful and kind to them. He argues that Dr. Johnson's cultural conflict testimony would have shown serious assimilation problems experienced by many Chinese who move to the United States during adolescence and might have had the positive effect of explaining that Mak's "stoic" demeanor was consistent with the cultural expectations of Chinese males.

[4] The district court agreed with Mak that here was a reasonable probability that the addition of the evidence would have changed the result. 754 F. Supp. at 1501. The district judge first pointed out that under Washington law, it was the "state's burden to convince every one of the twelve jurors, beyond a reasonable doubt, that there were no 'sufficient mitigating circumstances' to merit life imprisonment without parole rather than death. Wash. Rev. Code § 10.95.060(4). In

arguing for the death penalty, the deputy prosecutor relied upon the absence of any proof of positive human qualities in petitioner. He told the jury: 'What separates Willie Mak from the others . . . [is] the total absence of fundamental values. There's nothing here to lessen moral culpability.'" *Id.* (original emphasis deleted). The district court then noted that the jury appeared to have accepted this argument, while Ben Ng's jury, which heard mitigation evidence, including the testimony of Ng's mother, opted for life without possibility of parole. The court concluded that it was "impossible to know with certainty whether the mitigating evidence would have changed the outcome, but it very well might have--especially since the death penalty could not be imposed if even one juror was not convinced beyond a reasonable doubt that it should be. There is thus a reasonable probability that, but for the deprivation of counsel's effective assistance at the penalty phase, the result would have been different." *Id.*

[5] The State contends that the district court's prejudice analysis was flawed. First, the State argues that the district court erred in considering the effect of the proffered evidence on only one juror rather than the collective jury. In doing so, the State argues, the district court diluted the "reasonable probability" standard by violating the *Strickland* admonishment "not [to] depend on the idiosyncrasies" of one hypothetical juror. *See*

Strickland, 466 U.S. at 695. The State concludes that if the speculative sympathies of a potential holdout juror are accorded dispositive weight, the effect would be to lower a convicted defendant's burden.

. . [6] This argument lacks merit for two reasons. First, the State misconstrues the cited portion in *Strickland* which says that in considering what the jury's verdict would have been absent the error, there must be a presumption the decision would have been based on a proper application of the law as opposed to the "idiosyncrasies of the particular decision-maker, such as unusual propensities toward harshness or leniency." *Id. Strickland* does not stand for the proposition that a court cannot consider the effect of counsel's deficient performance on a single juror, but rather that the court cannot consider the possibility that a juror would render a decision not based on the law, but based on that juror's idiosyncrasies.[8] Second, the effect-on-one-juror

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[8]The Seventh Circuit upheld the effect-on-one-juror approach in *Kubat v. Thieret*, 867 F.2d 351, 371 (7th Cir.), *cert. denied*, 493 U.S. 874 (1989).

approach comports with Washington death penalty law.[9] The law of Washington, upon which *Strickland* presumes each juror has based his or her decision, allows any one juror to set aside the death penalty.

Next, the State contends the district court improperly applied a lower evidentiary standard of proof than the "reasonable probability" standard set forth in *Strickland*. It argues that the "it is impossible to know" and "very well might have" language amounts to the "some conceivable effect" standard expressly rejected by *Strickland*. *See* 466 U.S. at 693. We disagree with the State's reading of the district court's opinion; as we read it, the "might have" language modified only the court's single juror discussion, while the "reasonable probability" language in the following sentence modified the combination of facts upon which the court based its decision.

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[9]Wash. Rev. Code § 10.95.060(4) provides:

> Upon conclusion of the evidence and argument at the special sentencing proceeding, the jury shall retire to deliberate upon the following question: "having in mind the crime of which the defendant has been found guilty, are you convinced beyond a reasonable doubt that there are not sufficient mitigating circumstances to merit leniency?"
>
> In order to return an affirmative answer to the question posed by this subsection, *the jury must so find unanimously*.

(emphasis added).

Therefore, the district court properly applied the reasonable probability standard of proof.

[7] The State finally argues that, by comparing the life-without-parole result of the Ben Ng trial where the jury heard humanizing evidence at the penalty phase with the death penalty result of the Mak trial where the jury did not have the benefit of humanizing evidence, the district court improperly inserted a proportionality review into the *Strickland* analysis.

[8] Nothing in *Strickland* suggests that a proportionality review is inappropriate when considering prejudicial effect, and the State cites to no case law that supports such a notion.

On the whole, we cannot find fault with the district court's prejudice analysis. Although the present case differs from previous cases in which no prejudice was found, because in this case the proffered evidence would not have opened the door to damaging evidence,[10] it also differs from cases in which prejudice was found because here, the proffered evidence was far

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[10]*See Strickland*, 466 U.S. at 700 (no prejudice in failure to present evidence because the overwhelming aggravating circumstances outweighed the mitigating circumstances and the proffered evidence would have opened the door to harmful and conflicting evidence); *Campbell*, 829 F.2d at 1464 (failure to present mitigating evidence not prejudicial because "given the overwhelming aggravating factors, and, the heinous nature of the crime, there is no reasonable likelihood that the jury's verdict would have been different had the mitigating evidence been introduced," and the mitigating evidence could have opened the door to strong rebuttal evidence).

less exculpatory.[11] These cases demonstrate that this case falls somewhere in the middle of a typical *Strickland* prejudice analysis.

[9] We do not need to decide whether these deficiencies alone meet the prejudice standard because other significant errors occurred that, considered cumulatively, compel affirmance of the district court's grant of habeas corpus as to the sentence of death.[12] *See United States v. Tucker*, 716 F.2d 576, 595 (9th Cir. 1983) ("a court may find unfairness--and thus prejudice--from the totality of counsel's errors and omissions"); *Ewing v. Williams*, 596 F.2d 391, 395 (9th Cir. 1979) ("prejudice may result from the cumulative impact of multiple deficiencies") (quoting *Cooper v. Fitzharris*, 586 F.2d 1325, 1333 (9th Cir. 1978) (*en banc*), *cert. denied*, 440 U.S. 974 (1979)).

2. EVIDENTIARY ISSUES

[10] Mak argues his Eighth and Fourteenth Amendment rights were violated by the refusal of the trial court to admit at the penalty phase circumstantial evidence from which it might be inferred that Mak's co-defendant, Ben Ng, and a third party,

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[11] *See Deutscher*, 884 F.2d at 1160-61; *Evans*, 855 F.2d at 637-39.

[12] Mak urges counsel was constitutionally deficient at sentencing in three additional respects. We find these contentions without merit for reasons discussed in the memorandum disposition.

Hing Wong, rather than Mak, may have planned the massacre.[13] We conclude the exclusion of this evidence from the penalty phase of Mak's trial was an error of constitutional magnitude.[14]

. . The trial judge excluded the evidence in the penalty phase as irrelevant. The Washington Supreme Court affirmed on this same ground. *State v. Mak*, 718 P.2d at 424. In dissent, Justice Utter (speaking for himself and one other justice) argued the evidence was relevant because "if believed, [it] tended to decrease appellant Mak's guilt," *id.* at 449 (Utter, J., dissenting), and that since it was relevant it should have been admitted under both Washington and federal law. Justice Utter cited Wash. Rev. Code § 10.95.060[3], which allows admission of all relevant evidence in the penalty phase regardless of its

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[13]Mak sought to introduce evidence to the following effect:

> A confidential informant told police that Wong was the "main heavyweight" who directed young Hop Sing Tong members like Ben Ng, and that Wong either directed or set in motion the massacre at the Wah Mee. Hing Wong had a longstanding plan to control gambling in Chinatown and had discussed robbing a gambling club like Wah Mee. Wong was in contact with Ben Ng the day of the massacre and had dinner with Ben that night. Ben Ng's car was seen at Wong's restaurant an hour before the killings. Wong offered to sell Ng a bulletproof vest one week before the incident. Wong was the banker for a business that had gone bankrupt four days before the massacre. Wong had previously asked others to shoot rivals and the shootings had occurred.

[14]We address Mak's argument that this evidence should have been admitted at the guilt phase in our separate memorandum of disposition.

admissibility under the rules of evidence. He also cited *State v. Bartholomew*, 101 Wash.2d 631, 683 P.2d 1079 (1984), in which the court stated that "when a jury is faced with the question whether or not the defendant should be put to death, the defendant should be allowed to submit any evidence of his 'character or record and any of the circumstances of the offense. . . .'" *Id.* at 646, 683 P.2d at 1089 (quoting *Lockett v. Ohio*, 438 U.S. 586, 604 (1978)). Justice Utter noted that the State justified the fact that Mak was sentenced to death although Ng received a life sentence in part on the ground that Mak was the leader of the massacre. 718 P.2d at 451. Given this rationale, the proffered evidence that Wong planned the massacre and Ng was his agent was obviously central to the sentencing issue. *See id.*

The magistrate below agreed with the majority of the Washington Supreme Court that the trial court acted within its discretion in excluding the evidence as too remote. He read *Skipper v. South Carolina*, 476 U.S. 1 (1986), as holding only that the defendant should be allowed to put in any evidence relating to the defendant's character or record or the circumstances of the offense and found that the evidence offered by Mak did not seem to fit into either of these categories.

[11] Mak argues he had a constitutional right to present *all* relevant mitigating evidence related to his character or the

circumstances of the offense at the sentencing phase of his trial. We agree. The Supreme Court held in *Eddings v. Oklahoma*, 455 U.S. 104 (1982), that "the sentencer [may] not be precluded from considering, *as a 'mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.'" *Id.* at 110 (quoting *Lockett*, 438 U.S. at 604) (emphasis in original). "Equally clear is the corollary rule that the sentencer may not refuse to consider or be precluded from considering 'any relevant mitigating evidence.'" *Skipper*, 476 U.S. at 4 (quoting *Eddings*, 455 U.S. at 114). The state does not contest this reading of the law. The issue upon which the parties disagree is whether the evidence is relevant.

The state argues that federal law does not impose a more lenient standard of relevancy in capital sentencing than the standard imposed by the State's interpretation of its own rules of relevance--that the failure to satisfy the State's rules of relevance renders evidence inadmissible in the penalty phase as well as the guilt phase of a capital trial. This is certainly wrong. The Supreme Court has repeatedly found evidence to be "relevant" to capital sentencing although the State had held it irrelevant under State rules of evidence. In *Skipper*, the Court explicitly rejected the State's argument that evidence of the defendant's future adaptability to prison life was irrelevant. 476 U.S. at 7

& n.2. The Court held the evidence to be "mitigating in the sense that [it] might serve as a basis for a sentence less than death." *Id.* at 4-5 (internal quotations omitted). In *Eddings*, the Court explicitly rejected the State's rule that evidence of the defendant's "violent" background was irrelevant to capital sentencing: "[W]hen the defendant was 16 years old at the time of the offense there can be no doubt that evidence of a turbulent family history, of beatings by a harsh father, and of severe emotional disturbance is particularly relevant." 455 U.S. at 115.

Whether Mak was the planner of the massacre went to his relative culpability, a factor Washington itself recognizes as relevant in this context. Under Washington law, the jury is instructed that in deciding if leniency is called for, it should consider "[w]hether the defendant was an accomplice to a murder committed by another person where the defendant's participation was relatively minor." Wash. Rev. Code § 10.95.070(4).[15]

Mak also argues that the actions of the prosecutor in painting Mak as the ringleader made the issue of Hing Wong's alleged participation in the massacre relevant, even if it would not otherwise have been. In closing argument, the prosecution said of Mak: "He made the plan and he went out and he carried out the plan, and the job of the defendant was the leader. His

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[15]Role in the offense is, of course, also considered a relevant factor under the United States Sentencing Guidelines. *See* U.S.S.G. § 3B.

job was to oversee everything else that was done by his two crime partners. It was Willie Mak who was in charge. He was not the confused outsider that he would have you believe, but he was the leader of the crime, acting with the motive to commit robbery."

These arguments not only made the issue of Mak's role in the offense relevant, Mak argues, but also gave Mak a due process right to an opportunity to rebut. In *Skipper*, the Court stated:

> Where the prosecution specifically relies on a prediction of future dangerousness in asking for the death penalty, it is not only the rule of *Lockett* and *Eddings* that requires that the defendant be afforded an opportunity to introduce evidence on this point; it is also the elemental due process requirement that a defendant not be sentenced to death "on the basis of information which he had no opportunity to deny or explain."

476 U.S. at 5 n.1 (quoting *Gardner v. Florida*, 430 U.S. 349, 362 (1977)).

Under either due process argument, Mak's position is compelling. As Justice Utter noted in dissent in the Washington Supreme Court, "[h]ad the contested evidence been admitted, it could have raised doubts about Mak's alleged autonomy and control in the crime. Because the issue of Mak's control was so central to the penalty proceedings, the evidence of a third party's

involvement in the crime was relevant to . . . the issue of control . . . ." 718 P.2d at 451.[16]

3. ERRONEOUS JURY INSTRUCTIONS

Mak argues that the court's jury instructions and verdict form erroneously encouraged the jury to reach a unanimous verdict on all issues. Because the death penalty was the only issue that required a unanimous verdict, Mak alleges that this encouragement of unanimity necessarily encouraged jurors to vote for the death penalty and was contrary to law.

When a defendant is found guilty of aggravated first degree murder in Washington state, the presumptive sentence is life without the possibility of release or parole. Wash. Rev. Code § 10.95.030(1). This presumptive sentence can *only* be overcome by a unanimous verdict that "there are not sufficient mitigating circumstances to merit leniency." *Id.* at § 10.95.060(4). At the penalty phase of Mak's trial, *without objection* from defense counsel, the following instructions were submitted to the jury:

Jury instruction number 2 read:

> Jurors should consult with one another and deliberate with a view to reaching a unanimous verdict, if it can be done without violence to individual judgment. Each of you must decide the case for yourself but only after an impartial consideration of the evidence with

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[16]For the same reasons, exculpatory evidence revealed at Tony Ng's trial should be admitted during resentencing.

your fellow jurors. In the course of deliberations, you should not hesitate to re-examine your own views and change your opinion if you are convinced it is erroneous. However, you should not surrender your honest conviction as to the weight or effect of the evidence solely because of the opinions of your fellow jurors, or for the mere purpose of returning a verdict.

Jury instruction 3 read, in pertinent part:

> If you unanimously answer "yes," [that you are convinced beyond a reasonable doubt that there are not sufficient mitigating circumstances to merit leniency,] the sentence will be death. If you unanimously answer "no," or if you are unable to agree on a unanimous answer, the sentence will be life imprisonment without parole. . . .

Jury instruction 6 read in pertinent part:

> You must answer one question. All twelve of you must agree before you answer a question "yes" or "no". When all of you have agreed, fill in the answer to the question in the verdict form to express your decision. . . .

The verdict form read:

> Having in mind the crime of which the defendant has been found guilty, are you convinced beyond a reasonable doubt that there are not sufficient mitigating circumstances to merit leniency?
>
> *Answer:*
>
> [ ] "YES" (In which case the defendant shall be sentenced to death)
>
> [ ] "NO" (In which case the defendant shall be sentenced to life imprisonment without possibility of parole)
>
> [ ] "UNABLE TO UNANIMOUSLY AGREE" (In which case the defendant shall be sentenced to life imprisonment without possibility of parole)

Challenged instruction number 6 misstated the law by informing the jury that "all twelve of the [jurors] must agree" before they could answer "no" to the question whether there were sufficient mitigating circumstances to merit leniency. Challenged instructions number 2, 3 and the verdict form combined to improperly emphasize to the jury that unanimous agreement was required not to impose the death penalty.

[12] The Supreme Court has held that, where the underlying statute does not require unanimity, due process will not tolerate instructions that could reasonably be interpreted by a jury to preclude consideration of any mitigating factor unless such factor was unanimously found to exist. *Mills v. Maryland*, 486 U.S. 367, 384 (1988); *see also Kubat*, 867 F.2d at 373-74; *Kordenbrock v. Scroggy*, 919 F.2d 1091, 1109-10 (6th Cir. 1990) (en banc), *cert. denied*, 111 S. Ct. 1608 (1991). As in Mills, "[u]nless we can rule out the substantial possibility that the jury may have rested its verdict on the 'improper' ground, we must remand for resentencing." 486 U.S. at 377.

In *Kubat*, 867 F.2d at 371, the court found prejudice from erroneous instructions that called for a unanimous

agreement not to impose the death penalty.[17] The court reasoned:

> Whether the jury was completely misled or merely confused would not alter our determination that Kubat was prejudiced. At worst, the jury may have retired for deliberations believing it had to reach a unanimous verdict on sentencing just as it had to do on the merits. At best, it may have entered the jury room confused. *Indeed, even if only one juror had been confused, the reliability of the verdict is undermined. For if that one juror thought that the death penalty should not be imposed he or she might have submitted to the* views of the other eleven because of the mistaken belief that unanimity was required.

Id. at 371 (emphasis added).

The state argues *Kubat* is distinguishable because Mak's jury, in contrast with the jury in *Kubat*, was informed that Mak's sentence would be life imprisonment if the jurors did not unanimously agree upon a death verdict. We agree that in this respect the jury instructions and verdict form in *Mak* were not as prejudicial as those in *Kubat*.

We need not decide, however, whether in this case the prejudice would be sufficient in itself to require resentencing.

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[17]The instructions which were held to have misstated the law read: Number 6, "If, after your deliberations, you unanimously conclude that there is a sufficiently mitigating factor or factors to preclude imposition of the death sentence . . . . the Court will sentence the defendant to imprisonment." Number 7, "You will be provided with (2) two forms of verdict. When you have *unanimously agreed* upon your verdict you will select the form which reflects your verdict and sign it as I have stated." *Id.* at 369-70 (emphasis added by *Kubat* court).

There is no question that challenged instruction number 6 was an erroneous statement of the law. Although such an error might be tolerable were it the only error in the sentencing proceeding, it is nonetheless error which should be corrected at resentencing.[18]

Appeal No. 91-35256, Mak's cross-appeal is AFFIRMED.

Appeal No. 91-35615, the State's appeal of the grant of habeas relief in sentencing, is AFFIRMED and REMANDED for entry of an appropriate order for resentencing in accordance with this opinion.

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[18]Unlike *Lowenfield v. Phelps*, 484 U.S. 231 (1988), cited by the State, this case involves an erroneous statement of state law.

[FILED]
[JULY 16, 1992]

APPENDIX B

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 91-35256
NO. 91-35615
DC NO. CV-88-1421-WD

MEMORANDUM*

KWAN FAI MAK,

Petitioner-Appellee/Cross/Appellant,

v.

JAMES BLODGETT, Superintendent, Washington State Penitentiary at Walla Walla,

Respondent-Appellant/Cross/Appellee.

Appeal from the United States District Court
for the Western District of Washington
William L. Dwyer, District Judge, Presiding

Argued and Submitted March 24, 1992
San Francisco, California

Before: BROWNING, TANG and T.G. NELSON, Circuit Judges.

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* This disposition is not appropriate for publication and may not by cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

In this memorandum, we discuss and reject contentions raised in Mak's cross-appeal on grounds that do not merit publication.

I

ARGUMENTS CONCERNING THE GUILT PHASE OF THE TRIAL

A. WAS MAK DEPRIVED OF THE RIGHT TO PRESENT A DEFENSE BY THE TRIAL COURT'S REFUSAL TO ADMIT EVIDENCE OF THE POSSIBLE INVOLVEMENT OF HING WONG?

The refusal of the trial court to admit circumstantial evidence that Hing Wong, a third party, and Ben Ng, Mak's co-defendant, had planned the massacre did not violate Mak's Eighth and Fourteenth Amendment rights.

Several factors must be balanced to determine if state evidentiary rulings have caused a violation of the defendant's constitutional rights. *Perry v. Rushen*, 713 F.2d 1447, 1452-53 (9th Cir. 1983), *cert. denied*, 469 U.S. at 838 (1984).

On Mak's side of the balance, "[t]he right to present a defense is fundamental." *Id.* at 1450 (quoting *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973)). At the same time, "the state's legitimate interest in reliable and efficient trials is also compelling." *Id.* at 1451. Other factors must be considered:

> In evaluating the significance of the evidence, the court should consider all of the circumstances: its probative value on the central issue, its reliability, whether it is capable of evaluation by the finder of fact, whether it is the sole evidence on the issue or merely cumulative, and whether it constitutes a major part of the attempted defense. The weight of the state's interest likewise depends on many factors. The Court must determine the purpose of the rule, its importance, how well the rule implements his purpose, and how well the purpose applies in the case at hand. The court must give due weight to the substantial state interest in preserving orderly trials, in judicial efficiency, in excluding unreliable or prejudicial evidence.

Id. at 1452-53.

Mak argues that the proffered evidence was a major part of his defense to capital murder; that evidence Hing Wong planned the incident, coupled with testimony that Mak was not privy to the plan, would raise doubt as to the essential element of premeditation. Although the evidence is quite probative on the issue of Hing Wong's involvement, it is not strongly probative of Mak's premeditation. Assuming Hing Wong was the ring leader, Mak could still have premeditated the murders.

Moreover, the reliability of the evidence is questionable. The fact that Hing Wong planned to control gambling in China-town was to be established by testimony of Steve Chin that he overheard such an assertion by Wong in a 1980 conversation. 8 REC 3048. The defense's proposed corroborating witness,

Andy Wong, renounced his statement, and the defense intended to rely instead upon the double hearsay testimony of Detective Buckland, to whom Andy Wong allegedly had passed the information. 8 REC 3055. The fact that Wong set the massacre in motion was to be established by testimony of Lieutenant Holter that he had been so informed by a confidential informant, 8 REC 3050, whose identity was not revealed. To establish that Wong had arranged for murder of rival gang members, the defense intended to call certain witnesses who would testify that Wong had given them guns, but that they had returned them without committing any shootings. 8 REC 3058. To show that Wong had offered to sell Ben Ng a bulletproof vest, the defense proposed to rely upon the testimony of a third party to the effect that Ng had told him of the offer. 11 REC 3854.

On the state's side, the purpose of the rule, as the *Perry* court noted, is "to avoid undue prejudice to the [state] from unsupported jury speculation as to the guilt of other suspects." 713 F.2d at 1453 (citation omitted). In this case, as in *Perry*, there was substantial danger that the jury would be diverted from consideration of Mak's guilt or innocence to consideration of the guilt or innocence of Wong, who was not indicted. This danger of jury confusion is "a significant factor in the balance." *Id.* The weight to accord to the danger depends on how extraneous

the evidence is. As noted, the probity of the evidence on the issue of Mak's premeditation is fairly weak; as in *Perry*, the evidence sought to be introduced "falls far short of the critical and reliable evidence considered in *Chambers* and *Webb*." *Id.* at 1455. The state court acted within its constitutional discretion in deciding on balance to exclude it.

B. WAS MAK DENIED HIS SIXTH AMENDMENT CONFRONTATION RIGHTS BY THE TRIAL COURT'S LIMITATIONS ON CROSS EXAMINATION FOR BIAS OF TWO PROSECUTION WITNESSES?

The refusal to allow cross-examination for bias of two prosecution witnesses, Yen Lau and Bon Chin, did not violate Mak's sixth amendment confrontation rights. The trial court held it was not constitutional error to deny cross-examination of Lau on the ground there was insufficient foundation to establish bias, since Lau had provided the police all the information concerning Mak to which he testified before the Red Lotus robbery or Lau's possible involvement in it came to light. 7 REC 2576. The trial judge also ruled that cross-examination of Chin regarding the Red Lotus robbery would "open the door" to re-direct examination regarding Mak's involvement in the same robbery. *Id.* at 2570.

Although we are concerned about the possible violation of Mak's sixth amendment rights under *Davis v. Alaska*, 415

U.S. 308 (1974), we agree that any error was harmless. In *Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986), the Supreme Court stated: "the constitutionally improper denial of a defendant's opportunity to impeach a witness for bias, like other Confrontation Clause errors, is subject to *Chapman* harmless-error analysis."

Mak argues the error could not be considered harmless beyond a reasonable doubt because the testimony of the two witnesses was crucial in developing the state's theory that Mak planned the massacre, an idea that may have led the jury to impose the death penalty. Although the testimony of these two witnesses was important to the theory that Mak was the leader, it was not particularly critical on the central issue of guilt or innocence. The backbone of the prosecution's case was the eyewitness testimony of Wai Chin, the sole survivor of the massacre.

Moreover, the gist of the testimony of the two witnesses (that Mak had a long standing interest in robbing a gambling club), was corroborated by Wai Chung Tam's testimony that Mak discussed the possibility of robbing the Wah Mee with him, and said he would use a gun because a lot of people in Chinatown knew him, 8 REC 2896-97, and by the testimony of

Sze Ming Ng that Mak had spoken to him about robbing a gambling club. *Id.* at 3083.

C. WAS MAK'S SIXTH AMENDMENT RIGHT TO CONFRONTATION VIOLATED BY THE PROSECUTION'S QUESTION TO A WITNESS DESIGNED TO ELICIT A DAMAGING HEARSAY STATEMENT BY A CO-DEFENDANT?

During questioning of one of Mak's witnesses, the prosecutor asked if Ng had told the witness that Mak had done all the shooting. Defense counsel's objection was sustained and the question stricken. Mak contends asking the question was in itself a violation of *Bruton v. United States*, 391 U.S. 123, 137 (1968), and *Douglas v. Alabama*, 380 U.S. 415, 420 (1965). *Bruton* and *Douglas* are inapplicable. *Bruton* involved the introduction of evidence -- a co-defendant's confession inculpating Bruton; in *Douglas* the equivalent of testimony was presented. In this case, there was no introduction of evidence or its equivalent; there was only the unanswered question of the prosecutor.

We treat the prosecutor's improper question as prosecutorial misconduct. In reviewing a claim of prosecutorial misconduct, we examine the entire proceeding "to determine whether the prosecutor's remarks 'so infected the trial with unfairness as to make the resulting conviction a denial of due

process.'" *Hall v. Whitley*, 935 F.2d 164, 165 (9th Cir. 1991) (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974)).

Under this standard, Mak's argument is without merit. The prosecutor's question improperly suggested to the jury that Mak was the principal gunman although the State had earlier maintained that Ng shot most of the victims. *State v. Mak*, 718 P.2d 407, 451 (Wash. 1986) (Utter, J., dissenting). However, Mak cannot demonstrate prejudice. Mak himself told the police that he shot all of the victims at the Wah Mee. 7 Rec. 2517, 2524. In addition, the substance of the improper remark was cumulative; there was abundant evidence, including eye-witness testimony and Mak's own admissions, that Mak participated actively in the murders.

D. WAS THERE PROSECUTORIAL MISCONDUCT IN THE GUILT PHASE CLOSING ARGUMENT, RENDERING MAK'S TRIAL FUNDAMENTALLY UNFAIR?

1. Inflammatory, Prejudicial Remarks

Mak alleges statements by the prosecutor in his closing remarks sought to appeal to the juror's passions and fears. On federal habeas, Mak must show that the remarks, taken in context, denied him a fundamentally fair trial. *Donnelly v. DeChristoforo*, 416 U.S. 637, 645 (1974). The magistrate noted that Mak's attorneys did not object to the arguments now

challenged, and held Mak had not been denied a fair trial under a plain error standard of review. 198 ER 29.

(a) Mak argues the M-1 argument was comparable to the argument found to be improper in *United States v. McRae*, 593 F.2d 700, 706 (5th Cir.), *cert. denied*, 444 U.S. 862 (1979). *McRae* was a direct appeal from a federal district court. The prosecutor's argument was evaluated under the Court's broad supervisory powers, not under the stringent standards applicable in determining whether a violation of due process has occurred. *See Darden v. Wainwright*, 477 U.S. 168, 181 (1986). Although the remark was found objectionable under this broad standard, the conviction was not reversed because the evidence against McRae was overwhelming. Even if considered improper, the M-1 remark in this case was not egregious, and Mak cannot show prejudice. The evidence of Mak's participation in the activities at the Wah Mee which led to the murders was overwhelming.

(b) We agree with Mak that the prosecution's reference in rebuttal to Mak's testimony as a lie that "rips through the bodies of the victims like another bullet. Rips through their families and relatives, rips through Wai Chin," was an improper appeal to pure passion even under the tolerant standard applied

to the "invited response." *See United States v. Young*, 470 U.S. 1, 11-14 (1985).

But Mak has failed to show the comment deprived him of a fair trial under the standard applied in *Darden*, 477 U.S. at 181, to remarks far more egregious. *Id.* at 180, n.12.

(c) Mak asserts the prosecutor improperly vouched for the eye-witness Wai Chin, particularly when he told the jury Wai Chin's survival was an "act of God" to ensure justice would be done. Mak also complains that the prosecutor expressed his personal opinion that Mak was guilty.

Although "[t]he government may not vouch for the credibility of its witnesses, either by putting its own prestige behind the witness, or by indicating that extrinsic information not presented in court supports the witness' testimony," *United States v. Simtob*, 901 F.2d 799, 805 (9th Cir. 1990), lawyers are allowed reasonable latitude in closing argument and may strike hard blows based upon the testimony and its inferences. *United States v. Birges*, 723 F.2d 666, 672 (9th Cir.), *cert. denied*, 466 U.S. 943, 469 U.S. 863 (1984). In context, the prosecutor's comment was not a representation that God vouched for the testimony of Wai Chin, but an attempt to emphasize the central importance of Wai Chin's testimony. There were no statements by the prosecutor that it was the prosecutor's personal opinion

that Mak was lying. The prosecutor's attacks on Mak's veracity were presented as inferences to be drawn from other testimony inconsistent with Mak's testimony. In effect, the prosecutor argued in favor of the accuracy of the prosecutor's version of the facts. This was not improper.

(d) Mak asserts the prosecution sought to "bully" the jury out of a reasoned consideration of the alternative of convicting Mak of first degree felony murder rather than aggravated first degree murder. The district court correctly ruled that the government had a right to argue that the jury should convict Mak of the more serious crime. The prosecutor's argument was strong, but neither misleading nor improper.

2. Irreconcilable Closing Arguments

Mak argues the prosecutor violated due process by taking inconsistent positions regarding the roles of Mak and Benjamin Ng in respect to the .22 Ruger semiautomatic pistol through which 26 shots were fired at the Wah Mee. *See Drake v. Kemp*, 762 F.2d 1449, 1478-79 (11th Cir. 1985) (en banc) (Clark, J. concurring in grant of habeas corpus), *cert. denied*, 478 U.S. 1020 (1986). Mak also argues that his due process claim is supported by the doctrine of judicial estoppel. *Russell v. Rolfs*, 893 F.2d 1033, 1037-39 (9th Cir. 1990), *cert. denied*, 111 S. Ct. 2915 (1991).

We agree with the district court's conclusion that the prosecution did not take inconsistent positions at the trials of the co-defendants. 198 ER 18-19. We also agree with the Washington Supreme Court's decision that there was only one arguable inconsistency -- who owned the gun; and this inconsistency was not prejudicial because it had no bearing on the basic issues of the trial. 718 P.2d at 414.

E. WAS MAK DENIED HIS SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS BY THE FAILURE OF THE TRIAL COURT TO REQUIRE JURY UNANIMITY?

Mak asserts the trial court's failure to give a general unanimity instruction deprived him of due process. The Washington Supreme Court held that although the state trial court failed to give the standard instruction, ("Since this is a criminal case, all twelve of you must agree for you to return a verdict. . . ,"), instructions No. 7 and 15 sufficiently inform the jury of the requirement of unanimity and "the polling of the jury established that the omission from the concluding instruction did not affect the final outcome of the case, thus was no more than harmless error in any event." 718 P.2d at 434. We agree.

Although the jury was instructed that it must unanimously agree that Mak "committed the murders to conceal the commission of the crime" beyond a reasonable doubt -- and did so, Mak contends the jury should also have been required to

determine unanimously and beyond a reasonable doubt what specific crime Mak sought to conceal. The Washington Supreme Court has rejected Mak's construction of the statute. In *State v. Jeffries*, 717 P.2d 722 (Wash.), *cert. denied*, 479 U.S. 922 (1986), the court held:

> The specific crime need not be stated, as the statute does not require it. It is true that the process requires proof beyond a reasonable doubt that the defendant committed the murders to conceal his identification as the person committing *a crime*. Due process, however, does not require that the specific crime be charged and included in the jury instructions.

Id. at 735.[1] Federal due process requires no more. *See*, *Schad v. Arizona*, 111 S. Ct. 2491, 2497, 2499 (1991) (a state may define a crime to include alternative means of committing the crime -- due process does not require the state to treat those alternative means as separate elements or separate crimes).

F. WAS MAK'S RIGHT TO DUE PROCESS VIOLATED WHEN THE TRIAL COURT DENIED HIM ACCESS TO APPROXIMATELY 800 PAGES OF POLICE STATEMENTS AND REPORTS?

The state contends that Mak's speculation that the police files might contain *Brady* material is not sufficient to require this

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[1]State courts are the ultimate expositors of state law and their construction of that law is binding on the federal courts. *See, e.g., Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975).

court to conduct an *in camera* review of the approximately 800 pages of police reports not provided to defense counsel because they allegedly did not contain exculpatory material. We agree. "In the typical case where a defendant makes only a general request for exculpatory material under *Brady v. Maryland*, it is the State that decides which information must be disclosed. Unless defense counsel becomes aware that other exculpatory evidence was withheld and brings it to the court's attention, the prosecutor's decision on disclosure is final." *Pennsylvania v. Ritchie*, 480 U.S. 39, 59 (1987) (footnote and citation omitted). Although Mak makes only a general request, the district court conducted an *in camera* review and held that the prosecution had fully complied with its responsibilities under *Brady*, *see Mak v. Blodgett*, 754 F. Supp. 1490, 1493 (W.D. Wash. 1991). Mak has already received more than he was entitled to under *Ritchie*.

G. DOES NEWLY DISCOVERED EVIDENCE OF TONY NG'S TESTIMONY WARRANT HABEAS RELIEF?

Tony Ng, one of Mak's co-defendants, fled to Canada after the robbery and killings, and was not apprehended until after Mak had been tried and sentenced. Ng was then extradited to the United States and tried. He testified at his own trial. Mak maintains that certain of Ng's testimony is new evidence,

warranting the grant of habeas relief. As applied to the guilt phase of Mak's trial, we disagree.[2]

In order to grant habeas relief for newly discovered evidence, it must appear the evidence (1) is new and (2) more likely than not would have resulted in the defendant's acquittal at trial. *See Gordan v. Duran*, 895 F.2d 610, 614 (9th Cir. 1990); *Quigg v. Crist*, 616 F.2d 1107, 1112 (9th Cir. 1980). We examine first the second prong of this test.

Mak asserts that Tony Ng's testimony would have created doubt as to whether the essential element of premeditation had been satisfied, because it would corroborate his own arguments to that effect. It is true that some of Ng's testimony does tend to corroborate Mak's account of the events. For example, Ng testified that Mak's plan in going to the Wah Mee was only to administer a retaliatory beating. He also testified that it was Benjamin Ng who first mentioned a robbery.

However, much of Tony Ng's testimony is not corroborative of Mak's story. Ng testified that Mak told him

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[2]In our separate published opinion, we affirm the district court's grant of habeas relief for the purpose of resentencing. At note 16, we found that the sentencing court's exclusion of Tony Ng's trial testimony was one of several significant errors that, when considered cumulatively, compel affirmance of the district court's decision to require resentencing of Mak.

that Friday night would be the best time to rob the Wah Mee. He also testified Mak told him to tie people up once they entered the Wah Mee. Additionally, Ng testified at great length of his fear that Mak would kill him if he did not accompany him to the Wah Mee, or if he went to the police.

Because of the mixed nature of Tony Ng's testimony, its persuasiveness as an argument to the jury is diminished. Furthermore, Ng's testimony is not strongly probative of Mak's lack of premeditation. It is therefore very doubtful that its mere addition would have resulted in Mak's acquittal at trial. Accordingly, we hold that denial of habeas relief because of this newly discovered evidence as applied to the guilt phase of Mak's trial was proper.[3]

II

ARGUMENTS CONCERNING THE PENALTY PHASE OF THE TRIAL

A. INEFFECTIVE ASSISTANCE OF COUNSEL

In addition to the arguments considered in the published portion of this disposition, Mak contends he lacked effective

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[3]Because Mak's argument fails to satisfy the second prong of the *Gordon* test, we need not consider whether Tony Ng's testimony constitutes "new" evidence.

assistance of counsel at the penalty phase on several grounds we find to be without merit.

Mak claims counsel's failure to introduce the special verdict form from Ben Ng's trial constituted ineffective assistance because without the information contained in the form, Mak's jury had no basis for comparing his culpability to that of Ng. In particular, the Mak jury did not know Ng's jury determined Ng had participated in a common scheme or plan, making him more culpable than Mak, who was not found to have entered into such a common scheme or plan. However, during the penalty phase, defense counsel did introduce Ng's verdict showing Ben Ng had received a life sentence rather than death and argued to the jury that Mak's sentence should be equitably tied to Ng's sentence. We agree with the district court that these actions met *Strickland's* standard for reasonable performance, because "the sentencing decision is based on the presence or absence of mitigating factors, not on the type of aggravating circumstances found," and since the special verdict form concerned aggravating factors rather than mitigating factors, there is no reason to think the jury would have found it mitigating. 198 E.R. 12.

Even if failure to present the special verdict form could be considered deficient performance, Mak did not suffer

prejudice. The jury had sufficient information to evaluate proportionately the equity of the sentences rendered. Mak's jury was exposed to more incriminating evidence about Ben Ng than Ng's jury was, including testimony at trial that Ben Ng was involved in a prior murder, 718 P.2d at 428, and Mak's jury heard counsel's argument that it would be unfair to impose a greater penalty on Mak since he and Ng were convicted for the same crime.

Mak claims defense counsel's failure to request a jury instruction on the presumption of leniency established by Washington's death penalty statute was ineffective assistance. However, instructions and argument adequately informed the jury that a life sentence would be imposed if the prosecution failed to prove an absence of mitigating circumstances meriting leniency. Lacking prejudice, the issue of deficient performance need not be reached.

Mak argues counsel's failure to correct the impression that his defense expert, Dr. Loftus, failed to interview the eyewitness because of neglect (rather than a lack of access to the witness) constituted ineffective assistance. However, as the magistrate found, the impression was corrected during closing argument. 198 ER 7.

B. WAS MAK DEPRIVED OF A FAIR PENALTY PROCEEDING BY THE PROSECUTION'S REFERENCE TO EVIDENCE OUTSIDE THE RECORD AND THE PROSECUTION'S COMMENT ON ONE OF THE STATUTORY MITIGATING FACTORS?

During penalty phase argument, Mak's counsel brought before the jury the fact that Benjamin Ng had received a sentence of life in prison without parole and urged the jury to impose the same sentence. In response, the prosecution reminded the jury that they were not present during the Benjamin Ng trial, and that they didn't know how much that jury knew about Ng. Then the prosecutor said, "[b]ut you also don't know about what mitigating circumstances were presented in the Benjamin Ng trial. You know some of it because you heard some of the psychiatric and psychological testimony, but you didn't hear all of it. . . . how can you be asked to base your vote now on what another jury did under different circumstances, hearing different facts, hearing different reasons to lessen the moral culpability of the person before them. " 11 Rec. 4166-67.

Mak argues that the prosecutor's comment was improper because it suggested to the jury that it base its decision on its speculation that the prosecutor knew something the jury did not. Viewed in context, the prosecutor's comments were responses in kind to the defendant's "equality" argument and would not warrant reversal, much less the granting of habeas relief. *See*

United States v. Young, 470 U.S. 1, 12-13 (1985) ("if the prosecutor's remarks were 'invited' and did no more than respond substantially in order to 'right the scale,' such comments would not warrant reversing a conviction."); *accord United States v. Tham*, 665 F.2d 855, 862 (9th Cir. 1981), *cert. denied*, 456 U.S. 944 (1982).

Mak asserts that the prosecutor's argument that age was not a sufficient reason for leniency in this case prejudiced the jury's evaluation of this factor. Washington law requires the jury to consider any relevant mitigating factor, Wash Rev. Code Ann. § 10.95.070, including "[w]hether the age of the defendant at the time of the crime calls for leniency." *Id.* at § 10.95.070(7). The government argues, and we agree, that the prosecutor's remarks were sufficiently tempered by the acknowledgment that the jury could find age a mitigating factor if it chose to do so.

C. DOES THE DISPARITY IN SENTENCES BETWEEN MAK AND BEN NG CONSTITUTE A VIOLATION OF THE EIGHTH AMENDMENT?

Mak argues that his Eighth Amendment rights were violated because Ben Ng, the co-defendant who the state admits fired most of the shots, received a sentence of life without parole, while Mak received the death penalty.

The constitution does not require a general proportionality review in death penalty cases. *See Pulley v. Harris*, 465 U.S. 37, 43-44 (1984). None of the cases cited by Mak support the proposition that the eighth amendment requires that co-defendants convicted of the same crime receive the same sentence. The disparity in sentences in this instance may be explained by the fact that the Ng jury was presented with evidence of mitigating circumstances, while the Mak jury was not, a matter dealt with in the published portion of this disposition.

D. DID THE JURY INSTRUCTIONS UNCONSTITUTIONALLY LIMIT CONSIDERATION OF MITIGATING CIRCUMSTANCES AND PERMIT CONSIDERATION OF AGGRAVATING FACTORS IN A WAY PREJUDICIAL TO MAK?

Mak contends the penalty phase jury instructions misled the jury because mitigating factors were always referred to in the plural, leading the jurors to believe they must find more than one mitigating factor to find sufficient mitigation to merit leniency. Further, the jury was not instructed that a single mitigating circumstance could be sufficient to merit leniency.

To obtain habeas relief concerning a challenged jury instruction, the petitioner must show that there is a reasonable likelihood that the jury applied the instruction in a way that violated the Constitution. *Estelle v. McGuire*, 112 S. Ct. 475,

482 (1991). We review the jury instructions and the verdict form in their context and under all the circumstances, including arguments of counsel, *Cupp v. Naughten*, 414 U.S. 141, 147 (1973), to decide whether there was a reasonable probability that the jury was misled, thus violating Mak's Eighth Amendment right to have the jury consider *any* relevant mitigating evidence offered. *See Eddings v. Oklahoma*, 455 U.S. 104, 113-14 (1982).

The jury was instructed that the absence of "any" mitigating circumstances justified the death penalty; and obviously "any" includes "one." Mak points to no instruction or argument that one mitigating circumstance was not enough to warrant rejection of a death verdict. The jury instructions clearly state that mercy alone was a sufficient mitigating factor for the jury to reject a death verdict. There is no reasonable probability that the jury applied the instructions in violation of Mak's Eighth Amendment rights.

Mak challenges the instructions on the ground they gave the jury an open-ended opportunity to consider any relevant factors without guidance from the court on what relevant factors could be considered, and thus allowed the jury to improperly consider non-statutory aggravating factors. We addressed this issue in *Campbell v. Kincheloe*, 829 F.2d 1453, 1458-59 (9th

Cir. 1987), *cert. denied*, 488 U.S. 948 (1988), and held that instructing the jury to consider "any relevant factors" gave the jury proper guidance. As the government correctly notes, "the State cannot channel the sentencer's discretion, but must allow it to consider any relevant information offered by the defendant." *McCleskey v. Kemp*, 481 U.S. 279, 306 (1987).

Appeal No. 91-35256 is AFFIRMED.

Appeal No. 91-35615 is AFFIRMED and REMANDED for entry of an appropriate order in accordance with the published opinion filed in this case.

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[FILED]
[September 25, 1992]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NOS. 91-35256
and
91-3561

ORDER

KWAN FAI MAK,

Petitioner-Appellee/
Cross/Appellant,

v.

JAMES BLODGETT, Superintendent,
Washington State Penitentiary at
Walla Walla,

Respondent-Appellant/
Cross/Appellee.

Before: BROWNING, TANG and T.G. NELSON,
Circuit Judges

The panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

[FILED]
[JANUARY 8, 1991]

APPENDIX D

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

No. C88-1421WD

MEMORANDUM DECISION AND
ORDER ON PETITION FOR
WRIT OF HABEAS CORPUS

KWAN FAI MAK,

Petitioner,

v.

JAMES BLODGETT,

Respondent.

I.

INTRODUCTION

This is a petition for a writ of habeas corpus under 28 U.S.C. § 2254 by Kwan Fai Mak, a prisoner sentenced to death in the State of Washington. The respondent is warden of the Washington State Penitentiary at Walla Walla. The case arose from the so-called "Wah Mee Massacre." On the night of February 18-19, 1983, three young men of Chinese extraction entered the Wah Mee Club, an after-hours gambling establishment in Seattle. They tied up and robbed fourteen patrons and employees, then shot them. Thirteen victims died; the other survived and became a trial witness for the state.

The King County Prosecuting Attorney filed an information charging petitioner and co-defendant Benjamin Ng with thirteen counts of aggravated first degree murder and one of first degree assault. The third young man, Tony Ng (not related to Benjamin), was later charged with the same counts after being named by petitioner as the third participant. Tony Ng had disappeared shortly after the crime was committed.

Benjamin Ng was tried first and convicted on all counts. He had fired most of the fatal shots. At the penalty phase mitigating evidence was presented in his behalf. The jury did not agree unanimously that the state had proved beyond a reasonable doubt that there were not sufficient mitigating circumstances to merit leniency. Accordingly, Benjamin Ng was sentenced to life in prison without possibility of parole.

Petitioner was twenty-two years old at the time of the crime. He had come to this country from Hong Kong at age fifteen, as an immigrant with his family. His trial, before a different jury, followed that of Benjamin Ng. Petitioner's trial also ended in a verdict of guilty on all counts. The prosecution argued, and petitioner denied, that he had planned the crime. In the penalty phase virtually no mitigating evidence was presented in his behalf. The jury found that there were not sufficient mitigating circumstances to warrant leniency. On October 1, 1983, petitioner was sentenced to death.

Tony Ng was the last to be tried. He was captured in Calgary, Alberta, in October 1984. Because Canada has no capital punishment, had the prosecutor sought the death penalty, Ng's attorneys and Canadian authorities could have resisted extradition. The prosecutor's decision not to seek the death penalty made possible Tony Ng's return to Seattle. He was convicted on thirteen counts of first degree robbery and one count of second degree assault, and was sentenced to seven consecutive life terms in prison.

Petitioner appealed his conviction and death sentence to the Washington Supreme Court. In April 1986 that court affirmed by a vote of seven to two. *State v. Mak*, 105 Wn.2d 692, 718 P.2d 407 (1986). A motion for reconsideration was denied four months later. In December 1986 the United States Supreme Court denied certiorari.

In May 1988 the Washington Supreme Court denied petitioner's first personal restraint petition. Five months later the United States Supreme Court denied certiorari as to that ruling.

In November 1988 petitioner filed a petition for a writ of habeas corpus in this court, raising thirty-three claims under the United States Constitution. (Dkt. ##1, 2). Five days before his scheduled execution this court ordered a stay pending resolution of the claims. (Dkt. # 11). In accordance with the standard practice in this district, the petition was referred to a

United States magistrate for a report and recommendation. Magistrate Sweigert found that the petition included a claim as to which petitioner had not exhausted his state court remedies, and recommended dismissal with leave to amend to delete the unexhausted claim. (Dkt. # 56). This procedure was adopted by order dated February 13, 1989. (Dkt. # 61). Petitioner filed an amended petition ten days later. (Dkt. # 63). His personal restraint petition in state court, pursuing the deleted claim, was later denied by the Washington Supreme Court.

To avoid the possibility of repeated habeas corpus petitions, Magistrate Sweigert adopted a procedure designed to bring forth all claims at the same time. He directed petitioner to identify and present all his claims. In response, petitioner filed a declaration identifying all known claims, whether exhausted or not. He was then required to file a supplemental petition presenting every claim that he chose to litigate in federal court. He did so, adding eleven claims. Any claims not included in the supplemental petition were deemed abandoned. (*See* Dkt. ## 108, 120, 124, 134, 150, 151).

The magistrate then considered respondent's motion for summary judgment and petitioner's motion for an evidentiary hearing. On June 29, 1990, he issued his report and recommendation for disposition of all forty-three claims. (Dkt. # 198). Magistrate Sweigert concluded that forty of the claims

were without merit, and recommended denial. Two of the remaining claims, numbered 5.34 and 5.1, asserted ineffective assistance of counsel during the guilt and penalty phases of the trial; the third, number 5.7, alleged that petitioner's due process right under *Brady v. Maryland*, 373 U.S. 83 (1963), was violated when the trial judge denied him discovery of some 800 pages from the files of the Seattle Police Department's "Wah Mee Task Force." The magistrate recommended that an evidentiary hearing be held as to the ineffective assistance of counsel claims, and that the court review *in camera* the alleged *Brady* material to determine its materiality to petitioner's defense.

The court adopted a schedule, and later extended it at the parties' request, for objections to the report and recommendation. Objections were filed. On August 30, 1990, the court ordered an evidentiary hearing on the issue of whether the acts and omissions of defense counsel complained of were the result of a reasoned decision by counsel, or of oversight. (Dkt. # 226). On September 11, 1990, the court ordered an *in camera* inspection of the alleged *Brady* materials. (Dkt. # 232).

The evidentiary hearing was held on October 30, 1990. The parties then filed post-hearing briefs. Respondent moved to supplement the record with further declarations of Robert S. Lasnik and William L. Downing, who were the two deputy

prosecuting attorneys at petitioner's trial. The court granted the motion and allowed an opportunity for answering declarations. (Dkt. # 320). The record was complete as of December 18, 1990.

This memorandum decision constitutes the court's findings of fact, conclusions of law, and order on the petition for a writ of habeas corpus. For the reasons given, the petition is denied as to petitioner's conviction of aggravated first degree murder, and is granted as to the sentence of death. A new capital sentencing proceeding in state court will be required if the state decides to pursue the death penalty.

II.

EVIDENTIARY RULINGS

At the evidentiary hearing of October 30, 1990, live testimony was received from the two lawyers who represented petitioner at his trial, Donald L. Madsen and James A. Robinson. The testimony of the other witnesses was received by deposition. *See* Order Re Evidentiary Hearing (Sept. 11, 1990) (Dkt. # 232); 28 U.S.C. § 2246. Exhibits were offered and admitted at the hearing. A number of objections to deposition testimony were decided after the hearing. *See* Rulings on Objections to Evidence Offered at Evidentiary Hearing Held on October 30, 1990 (Dkt. # 293). Respondent particularly objected to the testimony of two expert witnesses: Richard

Cease, the Chief Public Defender in Spokane County, Washington, and Graham Johnson, an expert on the culture of Chinese immigrants to North America. These objections were overruled. The opinions expressed by Mr. Cease have been received only insofar as they bear on the standard of practice among competent practitioners in capital cases; they have not been considered insofar as they speak to whether deprivation of the right to the effective assistance of counsel occurred. In any event, the ruling on the petition for habeas corpus would be the same if the disputed parts of the Cease and Johnson depositions were excluded.

III.

FORTY CLAIMS AS TO WHICH MAGISTRATE HAS RECOMMENDED DENIAL

The filing of objections to a magistrate's report requires the judge to "make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made." 28 U.S.C. § 636(b)(1)(C). That has been done in this case. All claims have been reviewed *de novo*, and all relevant parts of the record, together with the parties' objections and briefs, have been fully considered. The magistrate's report of June 29, 1990, recommends denial of forty claims of alleged constitutional violations at petitioner's trial. (Dkt. # 198). The record confirms that all of these claims are

without merit; the magistrate's report as to them is hereby adopted as the order of the court; and the petition as to these forty claims is denied.

IV.

THE CLAIM THAT PETITIONER'S RIGHT TO DUE PROCESS OF LAW WAS VIOLATED WHEN THE TRIAL JUDGE DENIED HIM ACCESS TO APPROXIMATELY 800 PAGES OF POLICE STATEMENTS AND REPORTS

Petitioner's claim number 5.7 is that his *Brady* rights were violated when the trial judge denied him access to about 800 pages of documents generated by the "Wah Mee Task Force." *Brady* requires disclosure of evidence that is favorable to the accused and material either to his alleged guilt or his punishment. Where evidence has been specifically requested by the defense, it is material if it "would tend to exculpate . . . or to reduce the penalty," or if it "might have affected the outcome of the trial." *United States v. Dupuy*, 760 F.2d 1492, 1501 n.3 (9th Cir. 1985) (citations omitted).

An *in camera* review has now been conducted of the documents that were provided to the defense, and of those that were not. It is clear that the prosecuting attorneys complied fully with their duty under *Brady*. None of the requested material was required to be produced. This claim is therefore denied.

V.

THE CLAIM THAT PETITIONER WAS DEPRIVED OF THE EFFECTIVE ASSISTANCE OF COUNSEL, IN VIOLATION OF HIS SIXTH AMENDMENT RIGHT,IN THAT HIS COUNSEL FAILED TO PRESENT EVIDENCE IN MITIGATION AT THE PENALTY PHASE OF HIS TRIAL

A. Constitutional Standards

The Constitution requires the most careful scrutiny of every case in which a person has been sentenced to death. In *Johnson v. Mississippi*, 108 S. Ct. 1981, 1986 (1988), the Supreme Court said:

> The fundamental respect for humanity underlying the Eighth Amendment's prohibition against cruel and unusual punishment gives rise to a special "'need for reliability in the determination that death is the appropriate punishment'" in any capital case. *See Gardner v. Florida*, 430 U.S. 349, 363-364, 97 S. Ct. 1197, 1207-1208, 51 L. Ed. 2d 393 (1977) (quoting *Woodson v. North Carolina*, 428 U.S. 280, 305, 96 S. Ct. 2978, 2991-92, 49 L. Ed. 2d 944 (1976)) (WHITE, J., concurring in judgment).

The sixth amendment guarantees to every defendant the right "to have the Assistance of Counsel for his defence." The due process clause of the fourteenth amendment makes this requirement applicable to the states. *Gideon v. Wainwright*, 372 U.S. 335, 342 (1963). The Supreme Court has long recognized that the constitutional right is to "the *effective* assistance of counsel." *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970) (emphasis added). In *Strickland v. Washington*, 466 U.S.

668, 686-87 (1984), the Court held that this guarantee extends to a sentencing proceeding in a capital case:

> A capital sentencing proceeding like the one involved in this case, however, is sufficiently like a trial in its adversarial format and in the existence of standards for decision, see *Barclay v. Florida*, 463 U.S. 939, 952-954 (1983); *Bullington v. Missouri*, 451 U.S. 430 (1981), that counsel's role in the proceeding is comparable to counsel's role at trial – to ensure that the adversarial testing process works to produce a just result under the standards governing decision.

The Court in *Strickland* set out the test to be applied:

> A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Id. at 687.

The *Strickland* test has been applied in court of appeals cases in this circuit dealing with defense counsel's failure to present mitigating evidence. In *Campbell v. Kincheloe*, 829 F.2d 1453, 1462 (9th Cir. 1987), *cert. denied*, 109 S. Ct. 380 (1988), the court rejected a claim of ineffective assistance of

counsel through a failure to present such evidence on the ground that defense counsel had made a reasoned strategic choice:

> The record amply supports the district court's finding that the decision of Campbell's counsel not to present mitigating evidence at the sentencing proceeding was a reasoned strategic choice falling well within "the wide range of professionally competent assistance." [citing *Strickland* at 690].
>
> * * *
>
> Faced with the choice of limiting the state to a relatively tame presentation of Campbell's prior convictions, or potentially opening the door to devastating rebuttal evidence, Campbell's counsel chose the former route by electing not to present mitigating evidence.

In *Deutscher v. Whitley*, 884 F.2d 1152, 1159 (9th Cir. 1989), the Ninth Circuit reached the opposite result, and ordered a writ of habeas corpus granted, where counsel's failure to present mitigating evidence at a capital sentencing hearing reflected simply a failure to perform:

> We agree with the district court that Deutscher's counsel's performance was defective. Counsel's sole mitigating argument was that Deutscher must have had some sort of mental problem. Yet counsel did not even consider presenting evidence of Deutscher's mental problems or any other mitigating evidence at the penalty phase hearing. Counsel himself admitted at the state trial court hearing on this issue that this aspect of Deutscher's representation was deficient. Counsel made no tactical decision not to investigate Deutscher's possible mental impairment. He simply failed to do so.

The *Deutscher* court further found that the mitigating evidence could have made a difference:

> To show that prejudice resulted from his counsel's defective performance, Deutscher must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the

result of the proceeding would have been different." *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* We cannot say with confidence that the jury's sentencing decision would have been the same in this case had Deutscher's counsel presented the available mitigating evidence.

Id. at 1160.

The questions in the present case are whether defense counsel failed to present mitigating evidence at petitioner's sentencing hearing; whether, if so, the failure was such that petitioner was deprived of the effective assistance of counsel; and whether, if so, he failure was so serious as to deprive petitioner of a fair trial.

B. <u>The Failure to Present Mitigating Evidence</u>

In Washington a person convicted of aggravated first degree murder is sentenced either to life imprisonment without possibility of release or parole, or to be put to death. RCW 10.95.030(1). If the prosecuting attorney has given advance notice that the death penalty will be sought, and the person is convicted, a special sentencing proceeding is then held. RCW 10.95.050. This proceeding "shall commence as soon as practicable after completion of the trial at which the defendant's guilt was determined." RCW 10.95.050(3). Both parties may present evidence and argument at the sentencing hearing. RCW 10.95.060(2). The court instructs the jury, and the jury then retires to deliberate upon the following question:

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> Having in mind the crime of which the defendant has been found guilty, are you convinced beyond a reasonable doubt that there are not sufficient mitigating circumstances to merit leniency?

RCW 10.95.060(4). In order to answer "yes," the jury must be unanimous. *Id.* If the jury does answer "yes," the sentence "shall be death." RCW 10.95.030(2). If one or more jurors are not convinced of the absence of sufficient mitigating circumstances, the sentence is life imprisonment without parole.

Decisional law has defined the scope of evidence that may be presented at the special sentencing proceeding. The state may present, in its case in chief, evidence of the defendant's criminal record and relevant evidence which would have been admissible in the guilt phase. *State v. Bartholomew*, 98 Wn.2d 173, 654 P.2d 1170 (1982), *vacated and remanded for reconsideration*, 463 U.S. 1203 (1983), *reaffirmed*, 101 Wn.2d 631, 683 P.2d 1079 (1984). The defendant may then present evidence in mitigation. If he does so, the state in rebuttal may present evidence only if it is relevant to a matter raised in mitigation by the defendant, and only if its rebuttal value outweighs its prejudicial effect. *Id.*

Petitioner was represented at his trial by Donald L. Madsen and James A. Robinson. At the time both lawyers were employed by Associated Counsel for the Accused ("ACA"), a public defense agency in Seattle. The case against petitioner and

co-defendant Benjamin Ng was commenced in February 1983, but Messrs. Madsen and Robinson were not appointed until late May, 1983, when petitioner's original counsel withdrew.

The first phase of counsel's work was devoted largely to trying to get a continuance of the trial which had been scheduled for August 1983. After reviewing the initial discovery they moved for a continuance, stating: "There is no way in the world we can be prepared to try this case before October 1, 1983." 22 REC 7831. Their efforts to gain more preparation time are reflected at 22 REC 7831, 7849, 7875, 7883, 7904, 7917, 1958, and 7981. The trial commenced September 12, 1983, three and a half months after trial counsel were appointed.

Neither Mr. Madsen nor Mr. Robinson had any capital trial experience at the time. Each had tried only one murder case. Mr. Madsen had been out of law school about four years, and Mr. Robinson just over three years, and both had begun work at ACA soon after being admitted to the bar.

The "Wah Mee Massacre" case was the subject of intense pretrial and trial publicity, and was complicated by barriers of language and culture.

Defense counsel worked hard and conscientiously on the case, devoting many hours to it every week. However, they concentrated almost exclusively on the guilt phase. Their effort

was to show that petitioner had not intended that any murders be committed, and that the others were more responsible than he.

The effort did not succeed. Petitioner was found guilty on all counts.

The penalty phase of the trial -- the special sentencing proceeding -- began only a few hours after the verdict of guilty was returned. The prosecution presented no evidence. Petitioner at the time was twenty-two years old, and had come to this country as a fifteen-year-old immigrant from Hong Kong. The defense nevertheless presented no evidence regarding him, his background or family relationships, or the cultural differences and dislocations which arguably affected his conduct. The only evidence presented by defense counsel was the testimony of an expert on eyewitness identification (in an attempt to cast doubt on the testimony of a prosecution witness who testified in the guilt phase), and the penalty phase verdict of co-defendant Benjamin Ng, who had received a life sentence following his conviction on thirteen identical counts of aggravated first degree murder. Defense counsel had planned to present evidence regarding the involvement of one Hing Wong in planning the crime with Benjamin Ng, in hopes of rebutting the state's claim that petitioner was the planner, but the trial court ruled this evidence inadmissible.

There was substantial and important mitigating evidence readily available. The testimony of family members and others could have been offered to show that petitioner was the beloved youngest son of a traditional Chinese family; that he had been a good student and dutiful son in Hong Kong; that after coming to this country he did well in citizenship, and in some school subjects, for the first few years; that he worked and gave money to the family; that he helped his parents in other ways; that he was kind to other members of the extended family; and that he was a "favorite uncle" to young nieces and nephews. These relatives did not know that they could attend the trial and testify. The following evidence produced at the recent hearing, which was also available at the time of his trial, is illustrative:

Yen Sau Mak and Wan Hoi Wong are petitioner's immigrant parents. They joint declaration, as translated, is phrased partly in the third person, but represents their testimony on direct examination. The declaration reads in part as follows:

> Kwan Fai Mak was born in Hong Kong, the youngest of three children. The family was poor, but the parents worked hard. The family lived in the densely populated, relatively impoverished, Kowloon section of Hong Kong.
>
> Kwan Fair was a good son and was a good student in Hong Kong. He never presented any disciplinary problem for the parents. Kwan Fai and his parents were always close.
>
> When Kwan Fai reached the age of eleven or so, he started working part time, in

addition to continuing with school, and contributed money and food to the family unit.

The family moved to Seattle in 1976 because the parents believed the opportunities and standards of living would be better for their two sons and grandchildren in America. Kwan Fai's older sister had migrated to Seattle nine years earlier and the entire Mak family moved in with daughter, Karen Kwan, her husband and children upon arrival in Seattle.

There were radical differences in culture, conditions, and life style between Hong Kong and Seattle.

Kwan Fai was fifteen years old when the family immigrated. He enrolled at Sharples Jr. High in Seattle. Although he spoke little English, Kwan Fai was a good student at Sharples and received grades of "A" in science and math.

Kwan Fai continued to be devoted to his parents. When he could speak English sufficiently, he helped his father with daily transactions at the band and government offices and often ran errands for his mother. When he could drive, he chauffered [sic] his dad whenever requested because his father did not drive, although Mr. Mak had obtained a driver's license. Mrs. Mak becomes ill when riding in a car and Kwan Fai would routinely do grocery shopping his mother [sic].

Parents of Kwan Fai Mak have proudly preserved his school certificates dating back to his primary years in Hong Kong and including awards for perfect attendance, service and citizenship, academic honor roll, and certificate of promotion from Sharples Jr. High. See attached.

* * *

At Cleveland High School, Kwan Fai's grades declined. For reasons unknown to his parent, Kwan Fai dropped out of school at the beginning of the eleventh grade. He found employment and continued to be a good son and contributing member of the household. When Kwan Fai was working, he brought occasional gifts to his mother saying she should have some of these American conveniences. Kwan Fai often gave his parents money.

> The older son, his wife, and three small children, also lived in the parents household. Kwan Fai was good with the kids, playing with them and buying them gifts.
>
> Mr. and Mrs. Mak never observed anything about their son that indicated a violent disposition. To the contrary, in his relationships within the family, Kwan Fai was good natured and generous.
>
> Mr. and Mrs. Mak had no knowledge of any criminal activities on the part of Kwan Fai. Some time during the year prior to his arrest, Kwan Fai started spending a great deal of time in Chinatown, which was a change of behavior. Kwan Fai did not introduce many of his friends to his parents. They do not believe they ever met Benjamin Ng.

Deposition of Graham Edwin Johnson, Exh. 2 (Hearing Exh. 12). Petitioner's mother, Wan Hoi Wong, was cross-examined through an interpreter at her deposition. She testified under questioning by respondent's counsel:

> Q. Mrs. Mak, do you know if someone from your son's lawyer [sic] talked to the rest of your family about you coming to testify?
> A. No, I was never asked. If I was asked, I certainly would go. I didn't know. If they had asked, I would go with my husband, for sure, as a couple. Like, we would have gone as a couple. If I had to roll on the floor to go, I would roll on the floor to go.

Deposition of Wan Hoi Wong at 21 (Hearing Exh. 5).

Petitioner's father Yen Sau Mak, under questioning by respondent's counsel, testified through an interpreter:

> Q. You still believe that your son is innocent of these crimes, don't you?
> A. I trust my son. I do not think he has done something like this, and he is so filial to us all of these years.
> Q. What does filial mean?

A. Filial, meaning he is very obedient. He is very respectful of us. He is buying a lot of things home [sic]. He is treating the family members very well. Like when he has the money to buy something, he, himself, doesn't get it, and he will save those for his parents.

* * *

Q. *Is it your position that Kwan Fai* always told you the truth?

A. He never lied to me. Everything he told me is the truth.

Deposition of Yen Sau Mak at 21-22 (Hearing Exh. 4).

Photographs of petitioner as a child and young man, showing him with family members and schoolmates, were also available. These photographs suggest wholesome and friendly relationships. Deposition of Wan Hoi Wong, Exhs. 2A-2H (Hearing Exh. 5).

School records from Hong Kong and Seattle were also available as exhibits. These show that petitioner successfully completed the six-year primary course in Hong Kong, including a satisfactory grade for conduct; that he received commendations at Sharples Jr. High School in Seattle for service and citizenship and for regular attendance; that notwithstanding initial language difficulties, he achieved honor roll grades at Sharples; and that he showed abilities in science and mathematics, including some "A" grades, in junior and senior high school. Deposition of Wan Hoi Wong, Exhs. 4 and 5A-5E (Hearing Exh. 1).

Johnny Kwan, a nephew of petitioner although only two years younger, was a student at the University of Washington at

the time of the crime. He is now employed at a research laboratory and has nearly completed the work for a zoology degree at the University. He states in his declaration:

> I am a nephew of Kwan Fai Mak. My mother is Karen Kwan, Kwan Fai's older sister. My brother is Sonny Kwan.
>
> I am just two years younger than Kwan Fai.
>
> I was never interviewed by Kwan Fai's trial lawyers, although I may have met John Wolfe. I don't believe I met the trial lawyers until after Kwan Fai was sentenced to death. At that time they came to the house (my grandparents had moved back in with us after Kwan Fai was arrested) and talked about the appeal.
>
> I recall my grandparents were very confused when the first attorney that they had hired for Kwan Fai, John Wolfe, quit the case. They had no money to hire another lawyer and they did not understand the public defender system. My grandparents thought that Kwan Fai was being treated differently because they were poor. My grandparents still do not speak English.
>
> I was about five years old when my parents brought me to live in Seattle. I remember playing with Kwan Fai when I was a little toddler, but don't have alot [sic] of memory of those early childhood years in Hong Kong.
>
> When Kwan Fai's family moved to Seattle, Kwan Fai, Sonny and I developed good relationships with each other. Kwan Fai did not speak English when he moved to Seattle and this made it difficult for him to make friends with other kids at Sharples. However, Kwan Fai did well in school.
>
> I always liked Kwan Fai. He was a quiet person. He had a mellow personality. When Kwan Fai got older and wasn't in school he would sometimes take me and Sonny to dinner.

> As I got older, I got very involved in my high school activities and studying. I saw Kwan Fai less because of my own schedule. However, I still saw Kwan Fai at holidays and he continued to be friendly and good to be around. I don't recall anything out of the ordinary whenever I did see Kwan Fai.
>
> My observation was that Kwan Fai was a good family member. It is common in Chinese families for the youngest son to be a favorite and that appeared to be the case with Kwan Fai's parents. They loved Kwan Fai very much. There was a very close parent-son relationship between Kwan Fai and his parents. I know my grandparents, Kwan Fai's parents, wanted to help him and would have testified had they known they could help Kwan Fai. Myself and other family members also would have testified had we been asked and made aware that our information could help save Kwan Fai's life.

Deposition of Johnny Kwan, Exh. 1 (Hearing Exh. 10).

On cross-examination by respondent's counsel, Johnny Kwan testified:

> Q. Did you go to the trial?
> A. No.
> Q Why didn't you go?
> A. I didn't know when it was.
> Q. You didn't what?
> A. I didn't know when it was.
> Q. Okay. Do you know if anybody else in your family knew when it was?
> A. I don't believe so.

Deposition of Johnny Kwan at 17 (Hearing Exh. 10).

Yau Lin Mak, petitioner's sister-in-law, testified:

> I was never interviewed by Kwan Fai Maks [sic] trial lawyers.
>
> My husband and I have lived with his parents since we came to this country from Hong Kong. During most of our first two years in Seattle, Kwan Fai Mak also lived with us,

> although he lived separately for a few periods of time. I observed that Kwan Fai was a good person in the family, that he was good to his parents and considerate of the other people in the family. He was a kind uncle to our children and played with them affectionately. I never knew Kwan Fai to be violent – that was not his nature around the family.

Deposition of Yau Lin Mak, Exh. 1 (Hearing Exh. 8).

On cross-examination, Yau Lin Mak testified:

> Q. Do you recall what year you came to Seattle?
>
> A. 1980.
>
> Q. How often would you see Kwan Fai at the home?
>
> A. I saw him all of the time. Like, when I first got here, I did not know how to drive, and he was who took me to work and took we [sic] back home. A lot of times he took my kids out to play. He's a good guy.
>
> Q. Did he bring any of his friends around you?
>
> A. No.
>
> Q. Did you see him down in China Town?
>
> A. Well, sometimes in the weekend he took me out to China Town to have lunches.
>
> Q. Did you know that he was involved with criminal activity?
>
> A. No.

Deposition of Yau Lin Mak at 5 (Hearing Exh. 8).

It was also open to defense counsel at the trial to present expert testimony on the culture of the Hong Kong Chinese, and on the adjustment difficulties experienced by many of them in North America. Evidence of this type was presented at the recent hearing through the deposition of Professor Graham E.

Johnson, an anthropologist and sociologist at the University of British Columbia, who lived for several years in Hong Kong, speaks the language, and has excellent qualifications as an expert. Dr. Johnson had interviewed members of the Mak family. His testimony, if accepted, would show serious assimilation problems experienced by many Chinese who are moved during adolescence from Hong Kong to North America, and certain values in the Chinese culture of Hong Kong which could help to explain petitioner's involvement in criminal activities here. It would also suggest that petitioner's apparent lack of emotion at trial did not necessarily indicate disinterest or coldness, but was consistent with cultural expectations of Chines males. *See* Deposition of Graham Edwin Johnson (Hearing Exh. 12).

The foregoing if taken as a whole would have been potentially powerful evidence in mitigation. None of it was presented.

C. **The Reason for Failing to Present Mitigating Evidence**

In a capital case in Washington, once the accused has been found guilty, the sentencing proceeding that follows amounts to a separate trial. The issue for the jury is whether the defendant will live or die. The proof may go far beyond the crime in question. The defendant is entitled to present evidence of his background and life experiences. Whatever good traits he

may have, whatever he has done that is praiseworthy, the fact that he is cherished by family or friends, can all be placed in evidence. The sentencing hearing is defense counsel's chance to show the jury that the defendant, despite the crime, is worth saving as a human being. On the jury's assessment of this, the decision of life or death may depend. To fail to present important mitigating evidence in the penalty phase -- if there is no risk in doing so -- can be as devastating as a failure to present proof of innocence in the guilt phase.

In the present case it is clear that counsel failed to present the available mitigation evidence solely through oversight. There was no risk in presenting it. There was no decision on their part to leave it out. In the pressure and hurry of the moment, they simply did not think of using this type of evidence.

Mr. Madsen testified at the October 30 hearing, in response to questions by the court:

> Q. Did you know or did you believe, at the time of this trial, that showing the jury the defendant's human qualities, his family attachments, the fact that he was loved, if he was, by members of his family, could be important?
>
> A. I don't believe that we had considered that fully, how important, potentially, that evidence was.
>
> Q. Did you make any conscious decision about that kind of evidence one way or the other?
>
> A. I don't believe we did.
>
> Q. Can you explain why not?

> A. Looking back on it, I don't understand why we did not. I think that type of information could be extremely important. We did not choose to do that. We did not elicit that type of information from his family.
>
> Q. Was there anything about that kind of information, if offered in evidence, that you feared could open up something disadvantageous to the defendant?
>
> A. I don't believe that type of information could have opened up something that was to the detriment of the defense.

Transcript of Proceedings at 44 (Oct. 30, 1990) (Dkt. # 297).

Mr. Robinson's testimony is similar. *See id.* at 90-92.

The testimony of the deputy prosecutors who tried the case (both of whom are now King County Superior Court judges) confirms that, under the restrictions imposed on the state's rebuttal by the *Bartholomew* case, *supra*, there was no risk to the defense in presenting mitigating evidence from the family, school records, and similar sources. *See* Deposition of Robert S. Lasnik (Hearing Exh. 22); Deposition of William L. Downing (Hearing Exh. 21).

Both defense lawyers have testified that if they had gathered evidence of this type and understood its value they would have presented it. The proof would not be incompatible with anything else they planned to offer. The defense lawyers had talked to petitioner's parents, but through petitioner's brother rather than through a trained interpreter. One lawyer had formed the opinion that the mother should not be asked to make a plea for mercy, but he could not remember why, and both

counsel testified that they failed to seek mitigating *evidence* from the parents or anyone else. Transcript of Proceedings at 15, 27, 31, 59, 60, 72, 77 (Oct. 30, 1990) (Dkt. # 297).

During the guilt phase counsel had presented some evidence on local Chinese culture through lay witnesses, but in the main had found this unsatisfactory. *Id.* at 15, 45-46. They did not seek to obtain an expert, although there was no disadvantage in doing so. They presented no evidence as to Chinese culture and assimilation difficulties in the penalty phase. A Seattle lawyer experienced in capital cases, Timothy K. Ford, who was not counsel in this case, tried repeatedly to suggest that petitioner's Hong Kong background be explored. Declaration of Timothy K. Ford at 2-3 (Hearing Exh. 14). These suggestions were not heeded.

In the words of the Ninth Circuit, defense counsel "made no tactical decision" not to put on mitigating evidence; they "simply failed to do so." *Deutscher*, *supra*, 884 F.2d at 1159.

To make this finding is by no means to imply that Messrs. Madsen and Robinson were lacking in zeal, devotion to their client's cause, or skill in seeking his acquittal. These lawyers undertook a thankless and difficult job and bent every effort to handle it well. The problem was that in concentrating on the guilt phase of the case they completely overlooked the importance of gathering and presenting, at the penalty phase,

evidence favorable to their client as a person. When the jury's verdict as to guilt came in, they were caught without resources that they should have had. As shown by the testimony of the deputy prosecutor, the defense lawyers made an informal request, off the record, for additional time to prepare for the penalty phase. Declaration of William L. Downing (Nov. 14, 1990) (Dkt. #306). They failed to make or argue a motion, or do anything else on the record, for that purpose. Their informal request was denied and the penalty phase went forward a few hours later. They were unprepared for it. Their failure to gather and present mitigating evidence was not in any way calculated or purposeful, nor were counsel lacking in devotion to their client's cause. The failure was the result, rather, of a combination of their inexperience, the short time available to them to get ready to prepare for trial after their belated appointment, the cultural and linguistic barriers they failed to surmount, the press of events, and their single-minded concentration on the guilt phase. These reasons are understandable, but the failure to present important and readily available mitigating evidence, where no risk would have been incurred, must be held to be a deprivation of the right to the effective assistance of counsel.

D. Prejudicial Effect

To show the required prejudice, the petitioner must show a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *Deutscher*, 884 F.2d at 1160 (*citing Strickland*, 466 U.S. at 694). A reasonable probability is one "sufficient to undermine confidence in the outcome." *Id.*

Under Washington law it was the state's burden to convince *every one* of the twelve jurors, beyond a reasonable doubt, that there were no "sufficient mitigating circumstances" to merit life imprisonment without parole rather than death. RCW 10.95.060(4). In arguing for the death penalty, the deputy prosecutor relied upon the absence of any proof of positive human qualities in petitioner. He told the jury:

> What separates Willie Mak from the others, is the same thing that distinguishes him from all other murderers, the premeditation of this crime, *the total absence of fundamental values. There's nothing here to lessen moral culpability.*

Petitioner's Post-Hearing Brief at 5 (quoting 11 REC 4170-4171) (emphasis added) (Nov. 14, 1990) (Dkt. # 302).

The jury appears to have accepted this argument. Benjamin Ng, tried earlier by a different jury, was the subject of evidence in mitigation, including the testimony of his mother. Petitioner did not have the benefit of such evidence, although it

was available. It is impossible to know with certainty whether the mitigating evidence would have changed the outcome, but it very well might have -- especially since the death penalty could not be imposed if even one juror was not convinced beyond a reasonable doubt that it should be. There is thus a reasonable probability that, but for the deprivation of counsel's effective assistance at the penalty phase, the result would have been different. A person cannot constitutionally be put to death under such circumstances. The petition for writ of habeas corpus must be granted as to the sentence of death.

VI.

REMAINING CLAIMS

The other claims as to which the magistrate did not recommend a final disposition are petitioner's claims that he was deprived of effective assistance when his trial counsel failed to seek or object to certain jury instructions, failed to object to certain instructions, and failed to seek precautionary measures to minimize the effects of pretrial publicity. *See* Magistrate's Report and Recommendation at 4-6, 42 (claims 5.1 and 5.34) (June 29, 1990) (Dkt. # 198). These claims, as amplified in regard to both the guilt and penalty phases of the trial following issuance of the magistrate's report, have been fully considered under the applicable sixth amendment standards. Defense counsel's work in the respects challenged fell within the "wide

range of professionally competent assistance" contemplated by *Strickland*. These claims are therefore denied.

VII.

CONCLUSION AND ORDER

For the reasons stated, petitioner's conviction on all counts of aggravated first degree murder is constitutionally valid. The petition for a writ of habeas corpus is denied insofar as it seeks a new trial as to guilt or innocence. Petitioner was deprived of his sixth amendment right to the effective assistance of counsel when his trial attorneys failed to present readily available mitigating evidence at his sentencing hearing. The error was prejudicial to petitioner within the meaning of *Strickland v. Washington*, 466 U.S. 668 (1984). The petition is therefore granted as to the sentence of death, and the sentence is vacated. A new sentencing proceeding under the provisions of RCW 10.95.050 may be held, or the state may elect to waive the death penalty, in which event petitioner will be sentenced to life in prison without possibility of release. *See* RCW 10.95.030(1).

The clerk is directed to send copies of this memorandum decision and order to all counsel of record.

Dated: January 8, 1991.

William L. Dwyer
United States District Judge

APPENDIX E

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CASE NO. C88-1421WD

REPORT AND RECOMMENDATION

KWAN FAI MAK,

Petitioner,

v.

LAWRENCE KINCHELOE,

Respondent.

INTRODUCTION AND SUMMARY CONCLUSION

Petitioner is a state prisoner who has been sentenced to death upon his conviction of thirteen counts of aggravated first degree murder. His execution has been stayed pending resolution of this petition for writ of habeas corpus. The matter is now before the Court upon respondent's motion for summary judgment and petitioner's motion for an evidentiary hearing. After careful consideration of the extensive record and memoranda of the parties, and after hearing oral argument on all claims, I conclude that except for the ineffective assistance of counsel Claims 5.1 and 5.34 and the Brady material Claim 5.7, none of petitioner's claims have merit. Also, as to Claims 5.1 and 5.34 an evidentiary hearing is necessary, and as to Claim

5.7 and in camera review should be conducted. Each claim shall be discussed separately.

FACTUAL BACKGROUND

Petitioner was charged by information, along with codefendant Benjamin Ng, with thirteen counts of aggravated first degree murder and one count of first-degree assault. 12 REC 4201-4208.[1] The prosecutor filed a notice of intent to seek the death penalty for both defendants. 12 REC 4199-4200. The charges arose from the notorious "Wah Mee Massacre," a raid on a Chinese gambling club in the International District of Seattle, in February of 1983. Three young men entered the club, held all present at gunpoint, tied and robbed the victims, and then shot them.[2] One man, an elderly Chinese named Wai Chin, survived despite a gunshot wound in his head, and identified petitioner as a perpetrator. Petitioner's associate Benjamin Ng was also charged.

The trial judge granted a motion to sever the trials, and Benjamin Ng was tried first. He was found guilty as charged, but the jury was unable to unanimously agree on whether the state had proved the absence of sufficient mitigating

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[1]All citations to the record will cite to the volume and page number of the thirty-two looseleaf volumes filed by the State.

[2]The third codefendant, Tony Ng, was not known at the time of petitioner's trial, but was identified and tried later.

circumstances to warrant leniency. 4 REC 1240-1245. Accordingly, Ng was sentence to life in prison without possibility of parole, rather than death. RCW 10.95.060(4). Among the mitigating circumstances offered by the defense was the fact that Ng suffered from an organic brain disorder which caused behavioral disturbances. His mother also testified to plead for mercy.

Following Ng's trial, petitioner was tried; he was also convicted by the jury on all counts. At the special sentencing proceeding (the penalty phase), the only mitigating circumstances offered by the defense were the Ng sentencing verdict and expert testimony which attempted to cast doubt on the reliability of Wai Chin's eyewitness testimony. The jury unanimously found that there were not sufficient mitigating circumstances to merit leniency, and petitioner was sentenced to death. 11 REC 4180-82.

Petitioner challenged his conviction and sentence through a series of appeals and personal restraint petitions, and then filed this petition for habeas corpus. Following initial dismissal of the petition as a mixed petition pursuant to *Rose v. Lundy*, 455 U.S. 509 (1983), petitioner filed an amended petition containing the thirty-two claims which had been found to be exhausted. Ct. Rec. 61, 63. Respondent moved for summary judgment and petitioner moved to hold an evidentiary hearing. Ct. Rec. 86,

88. Shortly after opening briefs were filed, respondent moved to require petitioner to identify and present all known claims in this petition. Ct. Rec. 95. The motion was granted, and petitioner filed a declaration and supplemental declaration identifying all known claims, whether exhausted or not. Ct. Rec. 120, 124. Petitioner was then required to file a supplemental petition presenting every claim which he chose to litigate in federal court. Ct. Rec. 134. Petitioner filed a supplemental petition with eleven more claims, and respondent again moved for summary judgment. Ct. Rec. 150, 163. Respondent has not contested exhaustion of the eleven new claims.

DISCUSSION

5.1. Petitioner was denied his right to effective assistance of counsel and to a reliable sentencing proceeding because his attorneys did not effectively investigate and did not present evidence and argument in mitigation at the penalty phase of his trial, did not propose jury instructions, and did not seek precautionary measures to minimize the effects of extensive pretrial publicity, in violation of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

Petitioner claims that he was denied effective assistance of counsel in part because his inexperienced trial counsel, who had never before tried a capital case, failed to present available mitigating evidence at the penalty phase of the trial. The only mitigating evidence presented was the verdict form from the sentencing phase of the trial of Benjamin Ng, a codefendant, and

expert testimony from Dr. Elizabeth Loftus on the possible effect of retrograde amnesia on the testimony of eyewitness Wai Chin. The Ng penalty verdict, which was life imprisonment without possibility of parole rather than death, was presumably offered to show that it would be unjust to sentence petitioner to death, when his codefendant was not.

Petitioner contends that there was mitigating evidence available in the form of testimony from petitioner's family and close associates that would show that he was a good student and devoted son, and that his involvement in drug trafficking and gambling was considered by the Chinese community in Hong Kong, where petitioner had grown up, to be an acceptable way for a young man to get his start in life. Defense counsel did not conduct an investigation of this potential mitigating evidence, did not interview petitioner's Chinese-speaking parents or other family members on these subjects, and did not attempt to introduce any of this evidence at the penalty phase of the trial.

Respondent counters this argument by noting that evidence of petitioner's problems assimilating into American life was before the jury in the guilt phase of the trial. However, although the jurors were instructed that they should consider *all* the available evidence in deliberating on mitigating factors, neither defense counsel nor the prosecution mentioned this during closing argument, or invited the jury to consider it as a

mitigating factor. Specifically, the prosecutor called attention to the fact that the defense had presented only two pieces of evidence in mitigation: the Ng verdict and Dr. Loftus' expert testimony. Defense counsel mentioned only petitioner's youthful age as an additional fact for the jury to consider.

The Ninth Circuit Court of Appeals' standards for evaluating ineffective assistance of counsel claims which arise from failure to present mitigating evidence can be found in *Campbell v. Kincheloe*, 829 F.2d 1453 (9th Cir. 1987), and in *Deutscher v. Whitley*, 884 F.2d 1152 (9th Cir. 1989). In *Campbell*, the court found that counsel's failure to produce mitigating evidence at the penalty phase was a reasoned decision, based on fear of opening the door to damaging rebuttal evidence, and therefore there was no merit to the ineffective assistance claim. In *Deutscher*, in contrast, counsel's failure to present available mitigating evidence was not based on a tactical decision; counsel "simply failed to do so." *Deutscher*, 884 F.2d at 1159.

The crucial inquiry, then, is whether the absence of mitigating evidence here resulted from a reasoned decision by counsel not to present it, or from simple oversight. An evidentiary hearing is necessary to resolve this question. Respondent would have the Court dispose of this claim without a hearing for lack of a sufficient showing of prejudice, pursuant

to *Strickland v. Washington*, 466 U.S. 668 (1984). However, the very difference between the penalty verdict in petitioner's case and that in the Ng case shows a clear possibility of prejudice resulting from the dearth of mitigation evidence.

In light of the necessity for an evidentiary hearing on petitioner's ineffective assistance claim, the additional factual bases for the claim will not be addressed at this time.

5.2. Petitioner was denied due process and the effective assistance of counsel in violation of the Sixth and Fourteenth Amendments to the Constitution of the United States when the prosecutor denied a defense expert access to the sole eyewitness to the Wah Mee murders and misled the jurors as to the expert's actions in preparation for testifying.

This claim arises from the prosecution's cross-examination of defense expert Dr. Elizabeth Loftus in the penalty phase. She testified on the possible effects of retrograde amnesia on the memory of the sole surviving eyewitness, Wai Chin. Dr. Loftus had never spoken directly with Wai Chin. Upon cross-examination, the prosecutor elicited from her the statement that he had offered her an opportunity to meet with Wai Chin. Not mentioned, however, was the fact that the offer was later withdrawn. Defense counsel's attempt to correct this misleading impression was not allowed. Petitioner argues that this means his sole mitigating witness was left seriously and wrongfully impeached, and claims that counsel's failure to object to the

question during cross-examination constitutes ineffective representation.

This claim should be denied as lacking in merit. Counsel cannot be labeled as ineffective for failing to object to a line of questioning which was not objectionable. Moreover, defense counsel corrected the misimpression during closing argument, by mentioning that Dr. Loftus had not been allowed to interview Wai Chin. 11 REC. 4145. No evidentiary hearing is necessary on this claim.

5.3. The trial court violated petitioner's Sixth and Fourteenth Amendment right to present a defense and to compulsory process by excluding from the guilt phase of the trial expert testimony offered by the defendant on the topic of retrograde amnesia.

The trial court granted the state's motion to exclude from the guilt phase Dr. Loftus' testimony on retrograde amnesia in trauma victims, on the grounds that the subject was "within the general knowledge and experience of a lay jury." 8 REC 3044. The trial court also noted that the defense could make its point about eyewitness Wai Chin's inconsistent statements when cross-examining him. In other words, the fact that Wai Chin's memory was impaired would be clear to the jury from his testimony; there was no need for expert testimony on the possible reasons for the discrepancies in his testimony. Petitioner claims that this ruling denied him the right to present a defense. This claim is without merit.

A defendant's right to present evidence is not absolute. *Perry v. Rushen*, 713 F.2d 1447, 1450 (9th Cir. 1983). "Even relevant and reliable evidence can be excluded when the state interest is strong." Id., citing *Washington v. Texas*, 388 U.S. 14, 23 n. 21 (1967). The Ninth Circuit has adopted a balancing test to resolve the conflict between a defendant's constitutional right to present a defense and the state's interest in its evidentiary rules. *Id.*

The right of the defense to present any particular piece of evidence must be balanced against the state's legitimate interest in reliable and efficient trials. *Id.*, at 1451. "[U]nusually compelling circumstances [are] required to outweigh the strong state interest in administration of its trials." *Id.* at 1452.

Here, the testimony which the defense sought to introduce was cumulative on the issue of the reliability of Wai Chin's testimony. The discrepancies in his testimony were already obvious to the jury and subject to attack upon cross-examination; Dr. Loftus' testimony would not have added anything but a possible explanation for his faulty memory. Exclusion of the testimony in the interest of minimizing the complexity of an already prolonged and complex trial was not unduly prejudicial to petitioner, and did not deprive him of his constitutional right to present a defense.

5.4. By ruling that the defendant's proposed cross-examination of two prosecution witnesses would open the door to further questions concerning the defendant's participation in other uncharged crimes, the trial court violated defendant's Sixth Amendment right to confrontation and cross-examination.

Petitioner claims that he was denied the right to impeach prosecution witnesses Bon Chin and Yen Lau by showing that they had uncharged felonies which might have created a motive for their testimony on behalf of the prosecution. Actually, the proposed cross-examination was only disallowed as to Yen Lau, for lack of a sufficient foundation. As to Bon Chin, the court ruled that if cross-examination were allowed on his role in a previous robbery at the Red Lotus restaurant, then the prosecution would be allowed to elicit testimony that petitioner had also participated in that robbery. This evidence of a prior crime would be allowed in once the defense had "opened the door" by questioning Bon Chin about the robbery. 7 REC 2569. After this ruling, the defense did not attempt to impeach either Bon Chin or Yen Lau.

Bon Chin testified at trial that petitioner had contacted him in January of 1983 to solicit his help with the Wah Mee robbery. The proposed cross-examination by the defense would have elicited the fact that Chin had admitted to police his participation in a robbery at the Red Lotus, and the fact that he had not, as of the trial date, been charged for that crime. 7 REC 2560. The defense would have the jury draw the inference that

Bon Chin had made a deal in exchange for his testimony, and that therefore he might be biased in favor of the prosecution. However, counsel admitted he knew of no agreement between Bon Chin and the police which conditioned his testimony upon leniency. According to the prosecutor, the sequence of events leading to Bon Chin's testimony was such that it was unlikely that any such agreement had been made. Bon Chin told police of the call from petitioner, and promised to testify about it, before the Red Lotus robbery was mentioned by either party. 7 REC 2562. Yen Lau also provided statements to police before the Red Lotus incident and his role in it were explored. 7 REC 2572.

These facts distinguish this case from that presented in *Delaware v. Van Arsdall*, 475 U.S. 673 (1986), upon which petitioner relies in making this claim. In *Van Arsdall*, a witness acknowledged that a public drunkenness charge against him had been dismissed in exchange for his promise to discuss with the prosecution a murder he had knowledge about. He denied the agreement affected his actual testimony. The trial court barred cross-examination about the agreement. The Delaware Supreme Court, holding that this ruling violated the Confrontation Clause, reversed the conviction. The United States Supreme Court agreed that the defendant's constitutional rights had been

violated, but remanded for a determination as to whether that error was harmless. *Id.*, p. 677-684.

The *Van Arsdall* court found a constitutional violation in denial of cross-examination as to bias where there was an admitted agreement to talk in exchange for dismissal of charges. The Court stated, however,

> It does not follow, of course, that the Confrontation Clause of the Sixth Amendment prevents a trial judge from imposing any limits on defense counsel's inquiry into the potential bias of a prosecution witness. On the contrary, trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant.

Id., at 679. In the case at bar, the limits imposed on cross-examination were reasonable because there was no evidence or even any suggestion of an agreement between the witnesses and the prosecution to exchange leniency for their testimony. The inference of bias on the part of the witnesses was so speculative that the proposed interrogation would have been only marginally relevant.

Even if the limitation on cross-examination had violated petitioner's Confrontation Clause rights, this claim is without merit because the error was harmless. The constitutionally improper denial of a defendant's opportunity to impeach a witness for bias is subject to harmless-error analysis. *Van*

Arsdall, 475 U.S. at 684. The factors to be considered in such analysis include the importance of the testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination on other points, and the overall strength of the prosecution's case. *Id*. Here, the testimony given by Bon Chin and Yen Lau went to the issue of petitioner's role in planning the Wah Mee robbery. petitioner's guilt and his role at the actual scene were so well established by the testimony of eyewitness Wai Chin that the testimony of these witnesses was mostly cumulative. The prosecutor had a very strong case even without Bon Chin's and Yen Lau's testimony, and the evidence to establish bias on their part was nonexistent. Under these circumstances, the error, if any, was harmless.

5.5. Petitioner was denied his right to effective assistance of counsel at the penalty phase of his trial in violation of the Sixth and Fourteenth Amendments to the United States Constitution when trial counsel failed to present evidence of the codefendant's conviction of the aggravating circumstance that the murders were part of a common scheme or plan of the codefendant and failed to argue that the jury's acquittal of petition of the common scheme or plan aggravating circumstances would render a death sentence for him disproportionate to the life sentence of his codefendant.

Petitioner claims that counsel was ineffective in failing to introduce as a mitigating factor the special verdict form from the Ng trial, and that he was prejudiced thereby. The special

verdict form would have shown which two of the three aggravating circumstances the jury found in Ng's case, namely,

> (b) There was more than one victim and the murders were part of a common scheme or plan of the defendant; and,
>
> (c) The murder was committed in the course of or furtherance of a robbery.

30 REC 10215. The Ng jury answered "No" to one of the three possible aggravating circumstances, namely,

> (a) The defendant committed the murder to conceal the commission of a crime or to protect or conceal the identity of any person committing a crime.

Id. Petitioner contends that without the special verdict form, the jury had no basis for comparing his culpability to that of Ng and, therefore, no basis for making their respective sentences proportionate. There is no merit to this claim.

Petitioner's jury was shown the Ng sentencing verdict, which showed the jury was unable to agree on the presence of a mitigating factor, and thus gave Ng a sentence of life imprisonment rather than death. 4 Ben ng REC 1260. The obvious intent in introducing this evidence at the penalty phase was to ask for similar leniency for petitioner. The special verdict form from the guilt phase of the Ng trial would have added nothing to this; the sentencing decision is based on the presence or absence of mitigating factors, not on the number or type of aggravating circumstances found. There is no basis for finding that the Ng special verdict form on aggravating

circumstances might have been considered a mitigating factor by petitioner's jury.

In order to gain habeas corpus relief on a claim of ineffective assistance of counsel, a petitioner must show both that counsel's performance was deficient and that the deficiency prejudiced his defense. *Campbell v. Kincheloe*, 829 F.2d at 1462; citing *Strickland v. Washington*, 466 U.S. at 667 (1984). In order to find counsel's performance deficient, the Court must find "errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Campbell*, 829 F.2d at 1462. This Court must indulge a strong presumption that counsel's conduct "falls within the wide range of reasonable professional assistance." *Id.* In light of this standard and the presumption, it cannot be said that counsel's performance in not presenting the special verdict from was deficient.

5.6. Petitioner was denied his Sixth Amendment right to confrontation and his Fourteenth Amendment due process right to a fair trial by the prosecutor placing before the jury evidence of a codefendant's hearsay accusation that the defendant did all the killings.

One of the defense witnesses was a psychiatrist who had examined Benjamin Ng and testified about his sudden outbursts of violent behavior. Upon cross-examination of this witness, the prosecutor suddenly asked, "And Benjamin Ng told you that it was Willie Mak who shot the people at the Wah mee Club,

didn't he?" Defense counsel objected before the witness could answer, and his motion for a mistrial was denied. The court did not specifically instruct the jury to disregard the prosecutor's improper question or its implications, but at the close of the trial there was the usual instruction to disregard any comments that were not evidence.

Petitioner contends that the trial court's ruling denied him his Confrontation Clause rights and deprived him of a fair trial. The state argues that the unanswered question was not an improper attempt to inject hearsay because it was not offered to prove the truth of the matter asserted, but rather was asked in the course of questioning the psychiatrist about his diagnostic procedure. Before ruling on the defense motion for a mistrial, the Court questioned the witness as follows:

> The Court: Doctor, let me ask you this, was the statements [sic] as to what occurred at the Wah Mee part of the history and factors upon which you based your conclusion?
>
> The Witness: Yes.
>
> The Court: Okay.
>
> . . .
>
> The Witness: I should say, your Honor, that my answer may be misleading, in that even though I used that as part of my understanding of what was happening, it would not change the diagnosis.

> The Court: I appreciate that. Deny the motion for a mistrial based upon the present record. Thank you very much.

10 REC 3585.

While the prosecutor's question, standing alone, appears to be improper, a review of the question in the context of the cross-examination shows that it did not unfairly prejudice petitioner nor deny him a fair trial. The question was never answered, and the jury was instructed at the close of the evidence to disregard all remarks, such as the one challenged here, that were not evidence. Even if the jury had disobeyed that instruction and considered the inference to be drawn from the question, that inference was merely cumulative on the issue of who actually did the shooting. At this point in the trial, the jury had already heard evidence that petitioner told an interrogating police officer that he had done all the shooting. Under these circumstances, petitioner's claim that he was denied his constitutional rights by the trial court's denial of a motion for mistrial is without merit.

5.7. The petitioner's Fourteenth Amendment due process right to a fair trial was violated when the trial judge denied petitioner discovery of approximately 800 pages of handwritten police statements and reports.

Prior to trial, the defense requested copies of some 800 pages of files from the Seattle Police Department's "Wah Mee Task Force," which was set up after the gambling club murders. The prosecution disclosed all materials they believed to be

relevant to petitioner's defense, but the defense asked the trial court for *in camera* review of the remainder of the files to determine whether more should be disclosed. 2 REC 446. The court reviewed random samples of the files, not every page, and ruled that the defense was not entitled to more than had already been provided. 2 REC 498, 516. The Washington Supreme Court, after reviewing the record, but not the disputed materials, held that petitioner's claim to the alleged materials was speculative, and the trial court did not abuse its discretion in denying the discovery request. 28 REC 9612-13. petitioner now asks this Court to review the police files *in camera* to determine whether any *Brady* material was wrongfully withheld.

A defendant is denied due process if the prosecutor fails to disclose material which is both favorable to the accused and material to either his guilt or punishment (*Brady* material). *Brady v. Maryland*, 373 U.S. 83, 87 (1963). "Materiality is the touchstone in the determination of whether evidence qualifies as *Brady* material." *United States v. Dupuy*, 760 F.2d 1492, 1501 n.3 (9th Cir. 1985). The standard used to determine materiality varies, depending on whether the material was specifically requested by the defense. *Id.* Where, as here, the evidence was specifically requested, it is material if it "would tend to exculpate . . . or to reduce the penalty," or if it "might have affected the

outcome of the trial." *Id.*, citing *Brady*, 373 U.S. at 88, and *United States v. Agurs*, 427 U.S. 97, 104 (1976).

The troubling aspect here is that the only determination of materiality of the investigative files was made by the prosecutor. As defense counsel pointed out, with no suggestion of wrongdoing by the prosecutor, it would be difficult for the prosecutor to "think like [a] defense attorney" and view the materials in the same light that the defense would, with an eye to possible exculpatory value. 2 REC 452.

The defense request was for information relevant to its theory that the Wah Mee Massacre was related to efforts by one Hing Wong to control gambling in the Chinese community. Any evidence about this man or about tong control of gambling, while not exculpatory on the issue of petitioner's guilt, might have been relevant to his degree of culpability in planning the murders, and thus relevant as a mitigating factor. At this point, no determination has been made by any court as to the materiality of the Wah Mee files. Accordingly, petitioner's request for *in camera* review of previously undisclosed portions of the files of the "Wah Mee Task Force," to determine whether *Brady* material was withheld from petitioner, should be granted. The scope of the order for *in camera* review should be discussed further at the evidentiary hearing.

5.8.i. Petitioner was denied his Sixth and Fourteenth Amendment rights to present a defense, by the exclusion of evidence from the guilt phase of trial that another person directed and conspired with petitioner's codefendant to commit the murders unbeknownst to petitioner.

5.8.ii The exclusion of evidence from the penalty phase of trial, of Hing Wong's complicity in the Wah Mee Massacre, violated petitioner's Eighth and Fourteenth Amendment rights.

This claim is based on the trial court's exclusion of testimony regarding one Hing Wong, whom the defense contended was the mastermind behind the Wah Mee murders. Counsel sought to present evidence of connections between Benjamin Ng and Hing Wong, such as a meeting some eighteen months prior to the Wah Mee incident, at which a takeover of Chinese gambling operations was discussed. The purpose of this testimony would have been to show that petitioner did not have the requisite premeditated intent for aggravated murder because Hing Wong, not petitioner, was the motivating force behind the murders. The trial court, after hearing an offer of proof, excluded the testimony as not relevant because it was too remote. The Washington Supreme Court agreed that the proffered testimony was neither relevant nor probative. *State v. Mak*, 105 Wn.2d 692, 718 (1986).

Petitioner states that the Hing Wong testimony would have served three separate purposes: (1) to negate the intent requirement for aggravated murder; (2) to rebut the state's evidence that petitioner had planned the crime; and, (3) to

present mitigating evidence during the penalty phase. Petitioner argues that it was for the jury to determine the credibility of the evidence, and that state court evidentiary rules cannot be used to prevent a capital defendant from presenting mitigating evidence, citing *Skipper v. South Carolina*, 476 U.S. 1 (1986). However, *Skipper* is not directly on point; the Court there stated that the sentencer in capital cases may not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record, or any circumstances of the offense. *Skipper*, 476 U.S. at 1670-71. Here, the proffered evidence regarding Hing Wong was neither an aspect of petitioner's character or record, nor a circumstance of the offense.

A defendant's right to present evidence is not absolute. *Perry v. Rushen*, 713 F.2d 1447, 1450 (9th Cir. 1983). See Claim 5.3 above. It was within the trial court's discretion here to exclude the proffered evidence regarding Hing Wong as too remote.

5.9. Petitioner's right to fundamental fairness guaranteed by the Fourteenth Amendment's Due Process Clause was violated when the prosecution first argued to the Ng jury that Ng held the Ruger semi-automatic, and then argued to the Mak jury that Mak held the Ruger semi-automatic, where twenty-six of the thirty-two bullets found at the scene of the crime were fired from the Ruger.

Police detectives determined that twenty-six of the shots fired at the Wah Mee Club, and presumably most of the fatal ones, came from a Ruger .22 semi-automatic pistol. At the trial

of Benjamin Ng, the prosecution argued that it was he who owned, held, and fired this gun at the Wah Mee. Petitioner contends that at his trial, the same prosecutor then argued that petitioner fired the Ruger pistol, thus taking inconsistent positions at the two trials. This contention is without merit.

A careful reading of the entire closing argument shows no statement which places the Ruger pistol in petitioner's hands at the time of the shooting. The prosecutor described the evidence of petitioner's role in planning the crime, the evidence that petitioner purchased the Ruger pistol and gave it to Ng, and the testimony of Wai Chin who said that petitioner held the Ruger while directing the other two codefendants during the robbery. 11 REC 3968, 3972-74, 3976, 3978, 4004, 4065. However, at no time in closing argument did the prosecutor actually state or imply that petitioner actually shot anyone with the Ruger; the implication of his argument was that after directing the robbery, petitioner gave the Ruger to Ng so he could do that which he was recruited for--the shooting.

> Now, obviously the defendant was an accomplice with Benjamin Ng and with Tony Ng and whoever actually held the gun, whoever actually pulled the trigger that sent the bullet into the brain of Jean Mar, it's irrelevant which one, because the defendant or an accomplice caused the death.

11 REC 3994.

> How can Willie Mak seriously sit here and tell you that he was surprised or confused about how Benjamin Ng was acting? That's

exactly the reason why he recruited Benjamin Ng. If you're going to need a guy who can shoot and kill people, he's a pretty reliable guy. And Willie had a history of providing him with guns, and he provided the guns in this case. That was part of the plan, and that's how it happened.

11 REC 4071. These statements are consistent with the prosecution's contention that petitioner planned and directed the robbery and the murders, even if he did not actually do most of the shooting.

5.10. The jury's special verdict that the multiple murders were not a part of a common scheme or plan of the defendant was inconsistent with the jury's general verdict that the defendant was guilty of aggravated premeditated murder in each of the thirteen counts in violation of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

Petitioner contends that the special verdict finding no "common scheme or plan" was inconsistent with the general verdict finding petitioner guilty of aggravated first degree murder, because premeditation is necessarily an element of aggravated murder. According to petitioner, the special verdict that he did not commit the murders as part of a common scheme or plan negates the premeditation element necessary for aggravated murder. This is a strained semantic argument.

Courts should make every reasonable effort to reconcile apparently inconsistent verdicts. *Los Angeles Nut House v. Holiday Hardware Corp.*, 825 F.2d 1351, 1353-54 (9th Cir. 1987). It is possible to do so here. The jury was properly instructed that in order to find petitioner guilty of aggravated murder, it necessarily had to find premeditation. 19 REC 6868.

If the jury then rejected the "common scheme or plan" special verdict, it could well have been because the jury was unclear as to the meaning of that language. The jury did find, however, two other aggravating factors to support the verdict of aggravated murder. 19 REC 6886.

Even if the verdicts were found to be inconsistent, there is no basis for habeas corpus relief. Inconsistent verdicts alone are not a basis for reversing convictions. *United States v. Slaughter*, 891 F.2d 691, 700 (9th Cir. 1989), citing *United States v. Powell*, 469 U.S. 57 (1984).

5.11. The verdict of petitioner's jury that the murders were not part of a common scheme or plan of the defendant renders the petitioner's death sentence disproportionate when compared to the life sentence of his codefendant who was found to have schemed and planned the murders in violation of the Eighth and Fourteenth Amendments.

Petitioner contends that his death sentence is disproportionate to the life sentence given codefendant Ng, because Ng was found, in the special verdict, to have committed the murders as part of a "common scheme or plan," whereas petitioner was not. Petitioner argues that this "freakish result" violates the Eighth Amendment, because he is to be punished more severely than his codefendant who, according to the jury verdicts, committed the greater crime.

Petitioner relies upon language in *Enmund v. Florida*, 458 U.S. 782 (1982), stating that "causing harm intentionally

must be punished more severely than causing harm unintentionally." *Id.* at 798. This language is not applicable here because both defendants were found guilty of causing harm intentionally: the jury necessarily had to find premeditation in order to convict petitioner of aggravated murder, and did so.

Under the Washington statutory scheme, a conviction of aggravated murder leads to a sentence of death unless mitigating circumstances are found by the jury, or the jury is unable to agree. RCW 10.95.030(2). The difference between Ng's and petitioner's sentences, then, is due to lack of jury unanimity as to mitigating circumstances in Ng's case, where as petitioner's jury was unanimous in finding none. Petitioner's claim that the sentences were disproportionate is without merit.

5.12. The petitioner's Fourteenth Amendment due process right to a fair trial was violated by the admission of evidence that police found nine kinds of ammunition and four guns at the defendant's residence, where none of these guns and none of the ammunition could be connected to the crimes charged, and the State was permitted to cross-examine petitioner concerning these weapons and weapons sold to Benjamin Ng.

Prior to trial, the defense brought a motion in limine to exclude mention of guns and ammunition found at petitioner's home, or the grounds that they were unconnected to the crime charged. The trial court denied the motion, ruling that the guns were relevant the prosecution's theory that petitioner provided guns to Ng and, therefore, relevant to the issues of intent,

premeditation, and "common scheme or plan." Petitioner contends that this evidentiary ruling was highly prejudicial.

Improper evidentiary rulings provide a basis for habeas corpus relief only if the admission of the evidence was so fundamentally unfair as to violate due process. *Butcher v. Marquez*, 758 F.2d 373, 383 (9th Cir. 1985). The Washington Supreme Court held that the ruling was not improper. *State v. Mak*, 105 Wn.2d at 702-04. Yet even if the ruling were improper, it was not "fundamentally unfair." The guns themselves were not introduced into evidence. Testimony from the detective about petitioner's guns did not render the trial unfair, because petitioner later testified that he bought and sold guns. 9 REC 3377-82. Petitioner's contention to the contrary is without merit.

5.13. Petitioner's Sixth and Fourteenth Amendment right to a fair trial by an impartial jury was violated by the trial judge's refusal to sequester the jury during the trial, and then by unsealing court documents which gave rise to a series of newspaper articles which discussed allegations that the defendant was responsible for two additional uncharged murders.

The Wah Mee incident and the trials of the codefendants were highly publicized in the media. Petitioner contends that the publicity was especially adverse to him because his trial followed Ng's, and Ng placed the blame for most of the murders on petitioner. However, there is no federal constitutional right to jury sequestration per se; the failure to sequester a jury will

merit habeas corpus relief only if the failure is so arbitrary and unfair that it constitutes a denial of due process. *Powell v. Spalding*, 679 F.2d 163 (9th Cir. 1982).

The duty of the federal court in habeas corpus is to conduct an independent review of the record to determine whether there was such a degree of prejudice against a petitioner that a fair trial was impossible. *Harris v. Pulley*, 852 F.2d 1546, 1552 (9th Cir. 1988). The prejudicial effect of pervasive publicity is tested under either the "presumed prejudice" or the "actual prejudice" standard. *Id.* at 1553. When the community is so "saturated with prejudicial and inflammatory publicity" about the crime that the trial process is utterly corrupted, then prejudice is presumed. This standard is reserved for an extreme situation and is rarely applicable. Where news coverage is more balanced and factual, actual prejudice must be shown. *Id.*

Upon request from counsel for both petitioner and respondent, the Court has reviewed copies of news articles submitted by petitioner in support of this claim. Exhibits B-J. The record of publicity in the months preceding the trial, and during the trial itself, does not warrant the presumption of prejudice. Certainly, the crime, the investigation, the pretrial preparation, and the trial of Benjamin Ng all generated a great deal of publicity. However, the vast majority of the news articles were factual in nature. Those articles which

concentrated on the plight of the victims' families, as well as those which expressed the families' desire for the death penalty to be imposed, appeared in the *Seattle Chinese Post*, which was unlikely to be read by members of the jury. Exhibit E.

In the absence of a presumption of prejudice, petitioner has the burden of showing actual prejudice from the failure to sequester the jury. This petitioner has not done. Nowhere has petitioner alleged that a particular juror was exposed to media input during the trial. Therefore, the claim is without merit.

5.14. The trial court violated petitioner's Fourteenth Amendment due process right to a fair trial by permitting the head of the Seattle Police Department's Wah Mee Task Force to testify that the name "Mak" was familiar to him.

The Washington Supreme Court did not review this claim on the merits because of procedural default: the error alleged on appeal was different than the objection that was made at trial. The objection to the comment at trial was on the basis of relevance, while the error alleged on appeal was a violation of the evidentiary rule excluding evidence of other crimes. In finding procedural default, the state supreme court considered and rejected the application of RAP 2.5, which allows consideration of a claim raised for the first time on appeal if it is of constitutional magnitude. *State v. Mak*, 105 Wn.2d at 718-19.

Petitioner attempts to escape the effect of the procedural default in state court, which would effectively bar his claim in this court, by contending that the state procedural default rule is not consistently applied. Petitioner cites *State v. Jeffries*, 105 Wn.2d 398, *cert. denied*, 109 S.Ct. 379 (1988), as an example of the state court's inconsistency in applying the type of procedural default rule relied upon in petitioner's case. However, this argument is to no avail. In *Jeffries*, the court found an alleged constitutional error, involving jury instructions, which under RAP 2.5 it should consider even though the error was not raised at the trail level. Therefore, the *Jeffries* case was not an example of inconsistency in applying the rule of procedural default, but rather an example of the application of the same RAP 2.5 which was considered, but rejected, in petitioner's state court appeal.

When state court procedural default precludes state court review of an issue, the claim is barred in federal court as well, absent a showing of cause and prejudice. *Wainwright v. Sykes*, 433 U.S. 72 (1977). The state court's decision was based upon an adequate state ground, and petitioner has made no showing of cause and prejudice. Accordingly, the claim is procedurally barred from review in this court.

5.15. The trial court violated petitioner's Fourteenth Amendment due process right to a fair trial by denying defendant's motion for mistrial when a prosecution witness violated the court's pretrial ruling by referring to marijuana found in defendant's bedroom.

A defense motion in limine to exclude testimony about the marijuana found in a search of petitioner's bedroom was granted. Nevertheless, a police detective mentioned the "green vegetable matter" that was found during the search. The court instructed the jury to disregard the statement and denied a defense motion for a mistrial. 7 REC 2408, 2411.

Petitioner argues that the mention of marijuana was highly prejudicial to him. However, any prejudice to petitioner from the mention of the marijuana was so slight as to be negligible. The jurors were instructed to disregard the comment, and it is presumed that they followed that instruction. Moreover, petitioner himself later testified that he wanted to be involved in drug dealing. 9 REC 3403.

Nor can the error be considered prejudicial even when taken in conjunction with other alleged errors, such as the mention of weapons found in petitioner's bedroom and the mention that the name "Mak" was familiar to the police. Admission of the evidence of the guns was within the discretion of the trial court, as discussed above. The acknowledgement that the name "Mak" was familiar to police was, like the marijuana, so minimally prejudicial to petitioner as to have a negligible

effect on the jury. A mistrial should be granted only when a defendant has been so prejudiced that nothing short of a new trial can insure that he will be tried fairly. That was not the case here.

5.16. The trial court violated the petitioner's rights under the Eighth Amendment by refusing to grant defendant's motion to impanel a new jury at the penalty phase of trial, which thereby permitted the penalty phase jury to consider evidence of prior criminal acts, allegedly committed by defendant, for which he was never charged or convicted at the penalty phase of trial.

Washington statutes mandate that the same jury sit for both the guilt phase and the penalty phase, unless "unforeseen circumstances make it impracticable to reconvene the same jury. . . ." RCW 10.95.050(3). Petitioner contends that the cumulative effect of the admission of irrelevant and prejudicial evidence in the guilt phase inevitably tainted the jury's deliberations in the penalty phase, and that therefore a new jury should have been empaneled. Particularly prejudicial, according to petitioner, was the state's rebuttal evidence of petitioner's planning of or participation in other crimes involving robberies. However, this evidence of other criminal involvement was admitted pursuant to Washington ER 404(b) (which is identical to the federal rule of the same number) for a limited purpose, and the jury was so instructed. 9 REC 3405-3418.

Petitioner contends that the limiting instruction no longer applied in the penalty phase, becasue there the jury was directed

to consider all the evidence admitted in the guilt phase as well as that admitted in the penalty phase. This contention fails to take into account the fact that the purpose of the penalty phase is to determine whether there are "sufficient mitigating factors to merit leniency." RCW 10.95.030. Thus, the jury at the penalty phase is looking for mitigating factors, not further evidence of guilt. There is no basis for finding that petitioner's constitutional rights were violated by retaining the same jury for the penalty phase.

5.17. The prosecutor's closing penalty phase arguments denied petitioner his Fourteenth Amendment right to a fair trial.

In closing argument at the penalty phase, the prosecutor referred to statements he had made earlier about survivor-witness Wai Chin's courage and dignity. He urged the jury to reject petitioner's youth as a mitigating factor, and cautioned them that they had not heard all the mitigating evidence regarding codefendant Ng which led to his sentence of life rather than death. He also argued that at the penalty phase the state did not have the burden of proving anything, but rather of convincing the jury that there were insufficient mitigating circumstances to merit leniency.

Petitioner contends that these remarks and other made by the prosecutor in closing argument during the penalty phase denied him a fair trial and impermissibly lowered the

prosecution's burden of proof. Petitioner's assertion that there is a significant difference in meaning between "convince" and "prove," so as to lower the burden of proof, is unpersuasive. As to the remaining challenged comments, they were well within the bounds of permissible prosecutorial advocacy. Even if they were found to be improper, mere improper argument does not necessarily violate a defendant's constitutional rights. *Campbell v. Kincheloe*, 829 F.2d 1457. This Court can afford habeas corpus relief on a prosecutorial misconduct claim only where the argument is so egregious that the trial is infected with unfairness and the resulting conviction represents a denial of due process. *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974). That was not the case here.

5.18. The prosecutor's closing argument at the guilt phase of trial violated petitioner's right to a fair trial in violation of the Fourteenth Amendment.

Petitioner alleges that the following remarks by the prosecutor in closing argument denied him due process:

(1) "If you believe the defendant's story, vote not guilty and shake his hand, we'll give him back his M-1 and send him out the door. . . ." 11 REC 3998.

(2) "Every lie the defendant has told in this case rips through the bodies of the victims like another bullet. Rips through the families and relatives, rips through Wai Chin." Also, the prosecutor argued that a verdict of less than aggravated

murder would rob Wai Chin of his dignity. 11 REC 4064, 4085.

(3) The Act of God that saved Wai Chin was for a purpose: for him to come in and see that justice was done. 11 REC 4077.

(4) Repeated references to Mak "making a deal" for first degree murder rather than aggravated murder. 11 REC 3998.

The State argues that these remarks, taken either separately or together, were not so egregious as to render the entire trial "fundamentally unfair." *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974). When, as here, the remarks were not objected to when made, they are reviewed under the "plain error" standard of review. *U.S. v. Birges*, 723 F.2d 666, 672 (9th Cir. 1984). Improprieties in counsel's argument to the jury do not constitute reversible error unless they are so gross as probably to prejudice the defendant, and the prejudice has not been neutralized by the trial judge. *Id.*

Petitioner argues that the "M-1" comment was nearly identical to similar comments which drew strong criticism from the appeals court in *U.S. v. McRae*, 593 F.2d 700 (5th Cir. 1979). However, petitioner has failed to note that appeals court, although "appalled" by the remarks, found that they did *not* constitute reversible error. The court noted that they were "merely inflammatory," and were out of any of the "most

dangerous types: references to extra-record evidence, expressions of personal belief in guilt, or witness bolstering." The same could be said of all of the objectionable remarks here. Petitioner argues in particular that the "Act of God" statement was highly improper witness-vouching. However, the challenged statement did not invoke God in behalf of Wai Chin's credibility, but rather appealed to the jurors' sense of justice.

Petitioner contends that the real prejudice in these prosecutorial statements was that they attempted to persuade the jury to return a verdict of aggravated murder, rather than consider the lesser offense of felony murder. Even if that were true, there is no basis for finding a violation of petitioner's constitutional rights. It is the prosecutor's job to argue for a verdict of guilty in the most serious level of the crime charged.

The analysis used in *Darden v. Wainwright*, 477 U.S. 168 (1986), in which some highly inflammatory remarks by a prosecutor were found not to have deprived a petitioner of a fair trail, could apply to this claim as well:

> The prosecutor's argument did not manipulate or misstate the evidence, nor did it implicate other specific rights of the accused such as the right to counsel or the right to remain silent. . . . The trail court instructed the jurors several times that their decision was to be made on the basis of the evidence alone, and that the arguments of counsel were not evidence. The weight of evidence against petitioner was heavy; the "overwhelming eyewitness and

circumstantial evidence to support a finding of guilt on all charges" reduced the likelihood that the jury's decision was influenced by argument.

Darden, 477 U.S. at 181-182. Petitioner's contention that he was denied due process by the prosecutorial argument is without merit.

5.19. The trial court violated petitioner's Fourteenth Amendment due process and equal protection rights to proof beyond a reasonable doubt by instructing the jury that the prosecution burden of proof, in the penalty phase, was merely to "convince" the jury but not to "prove" to the jury, that there were insufficient mitigating circumstances to merit leniency.

At the penalty phase of the Ng trail, the prosecutor proposed, and the court adopted, in instruction that "the state has the burden of *proving* beyond a reasonable doubt that there are not sufficient mitigating circumstances to merit leniency and that the death penalty should be imposed. At the penalty phase in petitioner's trial, the prosecutor proposed, and the court adopted, an instruction that said, "the state has the burden o*convincing* you beyond a reasonable doubt. . . ." According to petitioner, this was an impermissible change in the burden of proof, one which was heightened by the prosecutor in closing argument. Petitioner's assumption that the difference in the two verdicts was due to the difference in the language of the instructions rests on an untenable semantic argument. As noted above, there is no significant difference in meaning between "to convince" and "to prove." In both cases, the standard was set forth as "beyond a

reasonable doubt." Therefore, the change in language did not lower the burden of proof.

5.20. The trial court violated petitioner's Fourteenth Amendment due process right to proof beyond a reasonable doubt by failing to instruct the jury that it was presumed that there were sufficient mitigating circumstances to merit leniency, and that this presumption lasted until overcome by evidence which proved, beyond a reasonable doubt, that the mitigating circumstances were insufficient.

Petitioner contends that an instruction on the presumption of leniency, similar to the presumption of innocence, is a requirement of due process. This Court will not reach the merits of this claim because it is procedurally barred.

A federal court will not consider the merits of a federal constitutional claim if a state's highest court has dismissed the claim in a collateral attack on the conviction based on an independent state procedural ground, unless cause and prejudice are shown. *Murray v. Carrier*, 477 U.S. 478, 492 (1986). In this case, the Washington Supreme Court found that petitioner had defaulted on the claim because defense counsel did not propose such an instruction. *State v. Mak*, 105 Wn.2d at 756. The court declined to review the claim under Washington RAP 2.5, which provides for review of errors of constitutional magnitude despite a procedural default, because "there is no constitutional right to a presumption of sufficient mitigating circumstances to merit leniency." *Id.*

In so ruling, the state court clearly and unambiguously applied a state law procedural bar, based on adequate and independent grounds. *Harris v. Reed*, 109 S.Ct. 1038 (1989). Federal habeas review is precluded on this claim unless petitioner can show cause for the default and actual prejudice from the alleged error. *Wainwright v. Sykes*, 433 U.S. 72, 87 (1977). Petitioner has not done so. As the Washington Supreme Court noted, there is no federal constitutional right to an instruction on a presumption of leniency in the penalty phase of a jury trial. The jurors here were properly instructed in Instructions No. 2, 3, 4, and 6 that the state had the burden of proving that there were not sufficient mitigating circumstances to merit leniency. 19 REC 6882-88. A statement that the state has such a burden of proof is tantamount to saying that leniency is presumed. Therefore there was no actual prejudice from the alleged error.

5.21. The trial court violated petitioner's Fifth Amendment right to remain silent by failing to instruct the jury during the penalty phase of trial, that it was not to consider the fact that the defendent did not testify at the penalty phase of trial.

This claim is without merit because petitioner's testimony at the guilt phase was also before the jury in the penalty phase. Therefore, it would have been inappropriate to instruct the jury regarding petitioner's failure to testify.

5.22. Petitioner's Fifth Amendment right to be prosecuted by indictment in a capital case is binding upon the State of Washington through the action of the Fourteenth Amendment due process clause, and was violated in this case.

It is a long-standing rule that indictment by a grand jury is not included in the due process guarantees provided to state criminal defendants by the Fourteenth Amendment. *Hurtado v. California*, 110 U.S. 516 (1884). The viability of this rule in the Ninth Circuit has been recognized many times over. *Morford v. Hocker*, 394 F.2d 169 (9th Cir. 1968); *Sims v. Eyeman*, 405 F.2d 439, 448 (9th Cir. 1969); *James v. Reese*, 546 F.2d 325, 327-28 (9th Cir. 1976). Petitioner's contention that an indictment by grand jury is constitutionally required in capital cases is wholly without merit.

5.23. RCW 10.95.030, the Washington capital punishment statute, violates the equal protection clause of the Fourteenth Amendment by authorizing the prosecution to seek different degrees of punishment for the same crime.

The Ninth Circuit's rejection of this same contention in *Campbell v. Kincheloe*, 829 F.2d at 1465, is dispositive of this claim. Petitioner states that it is raised here only to preserve the issue for appeal.

5.24. RCW 10.95, Washington's capital punishment statute, violates the Eighth and Fourteenth Amendments and is void for vagueness due to the lack of definitions for the terms "sufficient," "reason to believe," "mitigating circumstance," and "merits leniency."

Petitioner contends that the death penalty statute is unconstitutionally vague because it does not set forth standards

to guide the prosecutor in deciding whether to seek the death penalty, thus allowing "unbridled prosecutorial discretion," and because, in failing to define certain terms, it fails to give the jury sufficient guidance in deciding whether a death sentence is appropriate. The challenge to the Washington statute on the grounds of prosecutorial discretion has been explicitly rejected by the Ninth Circuit. *Campbell v. Kincheloe*, 829 F.2d at 1465. Similar challenges to other state death penalty statutes have been rejected by the Supreme Court. *Gregg v. Georgia*, 428 U.S. 153 (1976); *Profitt v. Florida*, 428 U.S. 242 (1976). "Absent facts to the contrary, it cannot be assumed that prosecutors will be motivated in their charging decisions by factors other than the strength of their case and the likelihood that a jury would impose the death penalty if it convicts." *Gregg*, 428 U.S. at 225 (White, J., concurring).

Petitioner's argument that the statute does not give the jury sufficient guidance, because certain crucial terms are undefined, is also without merit. The terms "sufficient," "mitigating circumstance," and "leniency" are not legal terms of art; they are words whose ordinary meaning is capable of being understood by jurors. Since, under the statute, the jury may consider "any relevant factor" as a mitigating factor, it would place undue restrictions on the jury's consideration to narrowly define these terms. RCW 10.95.070. The open-ended language

of the mitigating circumstances section protects a defendant's right to individualized sentencing according to the facts found by the jury. *Lockett v. Ohio*, 438 U.S. 586 (1978).

5.25. The constitutional defects in RCW 10.95 promote the unequal administration of the law in violation of the Fourteenth Amendment.

Petitioner contends that the Washington death penalty statute is devoid of meaningful standards, and that therefore prosecutors are vulnerable to political pressures in choosing whether or not to seek the death penalty. As a result, petitioner argues, "the executioner's song will play in Yakima County but not for an identical crime in Kitsap County." Ct. Rec. 94, p. 122-123. Petitioner argues that a review of actual cases in which the death penalty was sought or not sought will reveal that the penalty is applied differentially. Yet, the submitted cases show nothing more than the fact that in some murder cases the death penalty is sought, and in others, it is not.

Mere selective prosecution, without more, is not a federal constitutional violation. *U.S. v. Christopher*, 700 F.2d 1253 (9th Cir.); *cert. denied*, 461 U.S. 960 (1983). There must also be an allegation that the differences are based on impermissible factors such as race or other classification. *Wayte v. United States*, 470 U.S. 598 (1985). No such claim has been made here. Nor is there any evidence that the prosecutor's decision to seek the death penalty was motivated by anything

other than the strength of the case and the heinousness of the crime.

Petitioner asks that this Court supplement the record with materials from the Washington Supreme Court's death penalty review, showing all cases where the death penalty was sought. This is unnecessary, as petitioner has not made the type of claim that would trigger such review by this Court. "It is not necessary to conduct an evidentiary hearing as to studies which do nothing more than show an unexplainable disparity." *Harris v. Pulley*, 852 F.2d 1546, 1565 (9th Cir. 1988).

5.26. RCW 10.95 violates the Eighth Amendment by requiring a death sentence in all cases where the jury finds an absence of sufficient mitigating circumstances.

Petitioner contends that the Washington death sentence statute impermissibly imposes a mandatory death sentence. This claim was reviewed and rejected by the Ninth Circuit Court of Appeals in *Campbell v. Kincheloe*, 829 F.2d at 1465. That decision is dispositive of the claim here, notwithstanding petitioner's argument that a statement by the state attorney general in an amicus brief in *Adamson v. Ricketts*, 865 F.2d 1011 (9th Cir. 1988), casts doubt on the *Campbell* holding.

5.27. RCW 10.95.060(4) violates the due process clause of the Eighth and Fourteenth Amendments by shifting the burden of proof to the defendant to show why the death penalty should not be imposed.

This claim, like the one above, was decided adversely to petitioner's position in *Campbell*. That holding was reiterated more recently in *Adamson v. Ricketts*, 865 F.2d 1011 (9th Cir. 1988), a challenge to the Arizona death penalty statute. "In *Campbell*, this Court examined the language of Washington's death penalty statute and its construction by the state courts. We concluded that '[t]he language of the statute clearly indicates that the burden of proof is on the *state* to convince the jury beyond a reasonable doubt that there are not sufficient mitigating circumstances to merit leniency.'" *Adamson*, 865 F.2d at 1043, n. 51.

5.28. The failure to require petitioner's jury to articulate what mitigating circumstances they found and how they were weighed against the aggravating factors, violated petitioner's right to be free from the arbitrary and capricious infliction of capital punishment, guaranteed by the Eighth Amendment.

There is no constitutional requirement for the jury to specify what mitigating circumstances it considered. "The Constitution does not require a State to adopt specific standards for instructing the jury in its consideration of aggravating and mitigating circumstances. . . ." *Zant v. Stephens*, 462 U.S. 862, 890 (1984). Nevertheless, petitioner contends that such jury specificity is necessary for meaningfull appellate review. This

contention is without merit. Under the Washington statutory scheme, the state supreme court conducts mandatory review of all cases in which the death penalty is imposed. RCW 10.95.100. This review is based upon a report prepared by the trial court which contains information about all aspects of the trial, the defendant, the crime, the victim, and other factors. RCW 10.95.120. Among the information required in the report is the court's statement as to whether there was evidence of mitigating circumstances, and whether there was, in the court's opinion, credible evidence of mitigating circumstances. RCW 10.95.120. This information, along with all the rest required by statute, is sufficient for the supreme court to conduct meaningful review of the sentence.

5.29. The aggravating circumstances found in petitioner's case do not genuinely narrow the class of murderers eligible to receive the death penalty, in violation of the Eighth Amendment.

Petitioner contends that the following aggravating circumstance of which he was convicted, fails to genuinely narrow the class of persons eligible for a death sentence: "The murder was committed in the course of, in furtherance of, or in immediate flight from one of the following crimes," then listing robbery, rape, burglary, kidnapping, and arson. RCW 10.95.120(9). Petitioner contends that this section permits the death penalty to be imposed on a broader range of persons than

could be convicted of felony murder under RCW 9A.32.030(1)(c). This contention is without merit. Petitioner has ignored the statutory requirement that in order to find aggravated first degree murder, the jury must fist find premeditated first degree murder under RCW 9A.32.030(a).

Once premeditated murder is proven, the crimes listed in RCW 10.95.020(9) then become aggravating circumstances. Since the jury must find *both* premeditation and an aggravating circumstance to convict of aggravated murder, the class of persons eligible for such conviction is narrower than those eligible for a felony murder conviction.

5.30. The trial court failed to define and specify, in jury instructions, which crime or crimes the defendant intended to conceal by committing the murders, in violation of the Fourteenth Amendment.

This claim echoes the dissent in another capital punishment case, *State v. Jeffries*, 105 Wn.2d 398 (1986), in which a state supreme court judge stated that the specific crime being concealed by murder was an element of the aggravating factor, and thus should be named in the jury instructions. *Id.* at 452. The claim is without merit for several reasons. First of all, the defense here did not request such an instruction. Secondly, the jury found by special verdict that the murders were committed in the course of or furtherance of a robbery. 3

REC 869. Therefore, this was not a case of jury speculation as to the crime being concealed by the murders.

5.31. The petitioner's convictions were obtained in violation of the unanimity requirement of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

The "to convict" instruction on aggravated murder at the guilt phase of petitioner's trial included the following alternative elements, which were also set forth in the special interrogatories answered affirmatively by the jury:

> (a) The defendant and his accomplice committed the murder to conceal the commission of a crime or to protect or conceal the identity of any person committing a crime. . . .
>
> (b) The murder was committed in the course of or furtherance of a robbery.

3 REC 869, 19 REC 6868-69. Petitioner contends that the use of the "or" allowed the jurors to find in the alternative as to the aggravating circumstance, rather than reaching unanimity. Petitioner recognizes that absolute jury unanimity is not constitutionally required, citing *Apodaca v. Oregon*, 406 U.S. 404 (1972). Petitioner argues, however, that in a capital case such a unanimity requirement should be imposed. Even if this Court were inclined to do so, this would not be an appropriate case. The jury did unanimously find the aggravating circumstance that the murder was committed in the course or furtherance of a robbery. Since only one aggravating circumstance is sufficient to support a verdict of aggravated

murder, the second aggravating circumstance, as to which plaintiff complains of the lack of unanimity, was redundant.

Petitioner also raises a due process claim here, contending that a unanimous jury verdict as to all essential facts in a capital case is absolutely required by the state constitution. He states that "this arbitrary denial of a state-created right violates federal due process." Ct. Rec. 94, p. 111. However, the state supreme court found that the error, if any, was cured when the jury was polled. That state court determination as to its own law is binding upon this Court. *Wainwright v. Goode*, 464 U.S. 78 (1983).

5.32. The jury verdict finding both aggravating factors RCW 10.95.020(7) and RCW 10.95.020(9) violates the double jeopardy prohibition of the Fifth Amendment by imposing multiple punishments for the same act.

Petitioner was found guilty of two separate aggravating circumstances: committing a murder to conceal the commission of a crime and committing a murder in the course of or furtherance of committing robbery. Petitioner contends that the same act, concealment of the robberies, formed the basis for both aggravating circumstances, in violation of the double jeopardy clause. This contention is without merit.

Double jeopardy is not violated even if the same act forms the basis for prosecution and punishment for two different offenses, so long as each offense requires proof of a fact that the

other does not. *Blockburger v. United States*, 284 U.S. 299 (1932); *Colley v. Sumner*, 784 F.2d 984, 989 (9th Cir. 1986). Here, the focus of the two aggravating factors is entirely different. In one, the focus is on concealment of an unspecified crime; in the other, the focus is on furtherance of the specific crime of robbery, rape, burglary, arson, or kidnapping.

Further, the aggravating factors enumerated in RCW 10.95.020 are not elements of the offense of aggravated first degree murder, but rather sentencing enhancements for the crime of premeditated first degree murder. *State v. Kincaid*, 103 Wn.2d 304 (1985). It is only necessary for the jury to find one aggravating factor for the sentence enhancement to be triggered. The sentence for aggravated murder is not further enhanced by the finding of more than one aggravating factor.

5.33. The testimony of codefendant, Tony Ng, is new evidence which provides previously unavailable but important corroborating evidence of petitioner's trial testimony and theory of defense.

Petitioner contends that new evidence from the subsequent trial of Tony Ng, a second accomplice, negates the prosecution's theory that petitioner had the leading role in the murders at the Wah Mee Club. According to petitioner, the testimony of Tony Ng corroborates petitioner's own theory that his only plan was an assault on a rival tong leader, and that Benjamin Ng was actually the one issuing orders at the Wah Mee

Club. However, Tony Ng's testimony, since it is merely corroborative of petitioner's own, does not constitute material new evidence such that a new trial should be granted. Moreover, there was much in Tony Ng's testimony that was also highly damaging to petitioner, such as petitioner's threat to kill him, his family, and his girlfriend if he did not participate in the Wah Mee robbery. 7 Tony Ng REC 2188-89. This claim should be denied as too speculative.

5.34. Petitioner was prejudicially denied the effective assistance of counsel at the guilt phase of trial in violation of the Sixth and Fourteenth Amendments in that counsel failed to object to insufficient and incorrect jury instructions and failed to propose adequate jury instructions, and failed to seek precautionary measures to minimize the effects of extensive pretrial publicity.

This claim is an extension of the ineffective assistance of counsel claim raised in 5.1 to the guilt phase of the trial, and should be similarly addressed in an evidentiary hearing.

5.35. The trial court violated petitioner's right to a fair trial and due process of law in violation of the Fourteenth Amendment by failing to instruct the jury on the crime of murder in the first degree without aggravating circumstances. RCW 9A.32.030(a)(1).

This claim is procedurally barred, because it was dismissed by the Washington Supreme Court on adequate and independent state grounds. The state court held that:

> (1) the lesser included offense instruction that was given, not having been excepted to at trial, became the law of the case;

> (2) any error in connection therewith was invited error and cannot be complained of on appeal; and,
>
> (3) any error in that connection was harmless beyond a reasonable doubt.

State v. Mak, 105 Wn.2d at 748.

Petitioner argues that since the state court addressed both state procedural and federal harmless error grounds "in the conjunctive," there was no "plain statement" of the independent adequate state ground as required by *Harris v. Reed*, 109 S. Ct. 1038, 1045 n. 13 (1989). However, the current law in this circuit, as expressed in *Anselmo v. Sumner*, 882 F.2d 431 (9th Cir. 1989,) is that "if a state court clearly and expressly states that consideration of a federal constitutional claim is barred because of an adequate and independent state ground, federal review is foreclosed notwithstanding the fact that relief was denied on the merits in an alternative holding." *Id.* at 433, citing *Harris v. Reed*, 109 S. Ct. at 1044 n. 10. The *Anselmo* court specifically noted that *Harris v. Reed* has changed the law of this circuit in this respect.

5.36. RCW 10.95, the Washington death penalty scheme, expressly prohibits the jury from considering whether a single mitigating circumstance is sufficient to merit leniency in violation of the Sixth, Eighth, and Fourteenth Amendments.

Petitioner's claim is based on the language of the jury instructions at the penalty phase, in which the plural form (mitigating factors or mitigating circumstances) was always used,

instead of the singular. For example, Instruction No. 3 stated in part, "are you convinced beyond a reasonable doubt that there are not sufficient mitigating circumstances to merit leniency?" In Instruction No. 4, the court stated, "The State has the burden of convincing you that there are not sufficient mitigating circumstances to merit leniency and that the death penalty should therefore be imposed."

Petitioner argues that the repeated use of the plural form wrongly indicated to the jury that they needed to find more than one mitigating circumstance before the death penalty would be avoided. However, there is no basis for finding that a reasonable juror would interpret the instructions as petitioner argues. The fact that the jury is instructed to consider mitigating factors, in the plural, does not necessarily imply that they are therefore instructed that they must find more than one.

As the jury instructions state, the burden is on the prosecution to prove an absence of sufficient mitigating circumstances. It is solely for the jury to say whether one mitigating circumstance alone is "sufficient." The Ninth Circuit has noted,

> . . . even if the defendant never introduced any mitigating circumstances at either phase of the trial, the state still bears the burden of overcoming the presumption of leniency, and the jury is free to consider "any relevant [mitigating] factors" in making the sentencing decision.

Campbell v. Kincheloe, 829 F.2d at 1466, quoting *State v. Bartholomew*, 101 Wn.2d 631 (1984).

5.37. By instructing the jury at the penalty phase that it was to consider mitigating circumstances and relevant factors "having in mind the crime," the trial court prohibited the jury from making an individualized capital sentencing determination in violation of the Sixth, Eighth, and Fourteenth Amendments.

Petitioner bases this claim on Instruction No. 3, which stated: "The question you are required to answer is as follows: Having in mind the crime of which the defendant has been found guilty, are you convinced beyond a reasonable doubt that there are not sufficient mitigating circumstances to merit leniency?" 19 REC 6882. Petitioner argues that this instruction restricted the jurors' deliberation process, preventing them from making an "individualized determination," and excluding from deliberation any factors unrelated to the crime.

This is another semantic argument without substance. The jury was instructed in the same instruction that it could consider "any relevant factors, including but not limited to" factors related to the crime. In Instruction No. 5, the jury was instructed that a mitigating circumstance is a fact "about either the offense or about the defendant." 19 REC 6884. The instructions, taken as a whole, allowed for a highly individualized sentencing determination by the jury. Petitioner's contention to the contrary is without merit.

5.38. The trial court violated petitioner's Sixth Amendment right to a fair trial by an impartial jury, his Fourteenth Amendment right to due process, and the Eighth Amendment prohibitions of cruel and unusual punishment by instructing the jury during the penalty phase of the trial that it could consider any relevant factors.

Petitioner contends, in effect, that the lack of definition for the term "relevant factors" left the jury without any standards by which it could measure what factors were relevant to the sentencing decision before it. This is an expansion of the vagueness claim in 5.24, and it is similarly without merit. The "any relevant factors" language appeared in the instruction on mitigating factors, and properly expressed the state's rule that "the jury's liberal mandate under RCW 10.95.070 to consider 'any relevant factors' shall be limited to mitigating factors only." *State v. Bartholomew*, 98 Wn.2d 173, 198 (1982).

The Constitution requires that a capital defendant be allowed to introduce any relevant mitigating evidence. *California v. Brown*, 479 U.S. 538 (1987); *Harris v. Pulley*, 692 F.2d 1189, 1203-04 (9th Cir. 1982), *rev. on other grounds*, *Pulley v. Harris*, 465 U.S. 37 (1984). It was proper for the trial court not to define the term "any relevant evidence," as applied to mitigating factors, because such definition might then have impermissibly limited the scope of the jury's deliberation.

5.39. Proportionality review is required in the Washington death penalty scheme. Because there is no methodology for conducting the review, petitioner's sentence has been imposed in violation of his Fourteenth Amendment right to due process and equal protection and is unreliable under the Eighth Amendment prohibition against cruel and unusual punishment.

Petitioner contends that the proportionality review conducted in his case was arbitrary. There is no constitutional requirement for such review, so petitioner can only raise a due process claim regarding the review. *Pulley v. Harris*, 465 U.S. 37, 50 (1984). Petitioner claims that the proportionality review conducted in his case was in fact not effective because his sentence is "disproportionate to that imposed in the only similar case," namely Benjamin Ng's. This statement totally ignores the fact that the Ng jury could not unanimously agree as to mitigating circumstances, while the jury in petitioner's case unanimously found none.

Petitioner complains that the Washington Supreme Court has not articulated the standards by which it conducts this review and has "no methodology for choosing similar cases." Regardless of whether or not that is true, the one and only appropriate comparison case available for petitioner's crime was painfully clear. The court took note of this in stating that this was "the largest mass premeditated murder in our state's history." Therefore, even if the state supreme court has, as

petitioner asserts, no methodology for choosing similar cases, it made no difference in petitioner's case.

5.40. RCW 10.95 and the procedures set forth therein as applied to petitioner for the execution of a sentence of death denied petitioner his constitutional right to a fair trial, due process of law, assistance, of counsel, and to appear, defend, and confront witnesses against him.

In this claim, petitioner contests the procedure by which the state supreme court conducts its mandatory review of death penalty cases. Pursuant to statute, the trial court prepares a report following the conclusion of both phases of the trial, containing factual information supplied by the prosecutor, about the defendant, the crime, the victim, the trial, and other matters. RCW 10.95.120. Copies of the report are provided to defense counsel as well as to the prosecutor. Following submission of the report, "[t]he defendant and the prosecuting attorney may submit briefs [to the Supreme Court] within the time prescribed by the court and present oral argument to the court." RCW 10.95.130(1).

Petitioner contends that this procedure violated his constitutional rights because the prosecutor was allowed to present, ex parte, information to the court for inclusion in the report, and defense counsel was not given an opportunity to contest it. Petitioner does not allege, however, that he ever actually tried to contest the information, and was denied the opportunity. His statement that the statute does not provide a

means for a defendant to challenge or correct erroneous or prejudicial statements in the report is incorrect.

Petitioner wholly fails to show how the preparation of this report, coming as it does after the conclusion of the sentencing phase of the trial, deprives him of any constitutional right. The report has no impact on the jury's determination. It is prepared solely for the use of the state supreme court in conducting its proportionality review, which itself is not constitutionally required.

5.41. The trial court's instruction in the penalty phase on jury unanimity violated petitioner's rights to due process of law and to be free from arbitrary, excessive, and cruel and unusual punishment.

Petitioner's allegations arise from the penalty phase instructions on jury unanimity. In particular, petitioner challenges Instruction No. 2, which directed jurors to "deliberate with a view to reaching a unanimous verdict," and No. 6, which stated that "all 12 of you must agree before you answer a question [as to the existence of a mitigating factor] 'yes' or 'no.' When all of you have agreed, fill in the answer to the question in the verdict form. . . ." 19 REC 6881, 6885. Petitioner claims these instructions violate the dictates of *Mills v. Maryland*, 486 U.S. 367 (1988), which held that jury instructions requiring jurors to be unanimous as to the existence of a mitigating factor were unconstitutional.

Petitioner has merely taken parts of the instructions out of context to make them appear to require unanimity as to the existence of a mitigating factor, when in fact they do not. Instruction No. 2 instructed jurors to deliberate with a view to reaching unanimity "*if* it can be done without violence to individual judgment," and cautioned jurors not to surrender their honest convictions merely to reach a verdict. Instruction No. 3, which has not been cited by petitioner, clearly indicated three options to the jurors, and the consequences of each: "If you unanimously answer 'yes' [as to the nonexistence of a mitigating factor], the sentence will be death. If you unanimously answer 'no,' *or if you are unable to agree on a unanimous answer*, the sentence will be life imprisonment without possibility of parole." 19 REC 6882. Instruction No. 6 did say that "All twelve of you must agree before you answer a question 'yes' or 'no,'" but that instruction was given in reference to the verdict form which listed, in addition to spaces for an answer of 'yes' or 'no,' a space for marking "unable to unanimously agree." 19 REC 6896. When the instructions are read together, as is proper, it is clear that petitioner's unanimity claim is without merit.

5.42. The failure of the trial court to instruct the jury on the lesser-included offense of murder in the first degree, as defined by RCW 9A.32.030(1)(a), denied petitioner his constitutional right to a fair trial and due process of law.

This claim is a minor variation of Claim 5.35 and is similarly procedurally barred.

5.43. Petitioner was denied his rights to due process of law and a reliable death sentence proceeding because the evidence at the penalty phase was not sufficient to support the jury's finding that there were not sufficient mitigating circumstances to justify leniency.

Petitioner bases this claim upon the fact that the State produced no evidence at the penalty phase of the trial. However, the state is not required to produce any evidence at the penalty phase, since all evidence introduced in the guilt phase is still before the jury. Petitioner argues that the state is supposed to produce specific evidence to rebut whatever mitigating evidence a defendant has produced. However, that is not the case. The state may introduce such evidence, but is not required to.

A due process claim concerning sufficiency of the evidence will merit habeas relief only if a petitioner can establish that, considering all the evidence in the light most favorable to the prosecution, no rational trier of fact could have found proof of guilt beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319-326 (1979); *Miller v. Vasquez*, 868 F.2d 1116, 1119 (9th Cir. 1989).

Here, the evidence of petitioner's guilt was overwhelming. In light of that evidence, which was still before the jury in the penalty phase, the jury could rationally conclude that there was not sufficient mitigating evidence to warrant leniency.

CONCLUSION

Petitioner's motion for an evidentiary hearing should be granted as to Claims 5.1 and 5.34, the ineffective assistance of counsel claim. On Claim 5.7, the Court should conduct *in camera* review of the alleged *Brady* material to determine itsmateriality to petitioner's defense. As to all remaining claims, no evidentiary hearing is necessary, and none of them have merit.

A proposed form of Order is attached.

DATED this 29th day of June, 1990.

Philip K. Sweigert
United States Magistrate

[FILED]
[April 24, 1986]

APPENDIX F

[No. 49966-7. En Banc.

THE STATE OF WASHINGTON, Respondent, v.

KWAN FAI MAK, Appellant.

[1] Criminal Law – Trial – Argument of Prosecutor – Inconsistency. A factual inconsistency in a prosecutor's arguments in separate trials arising out of the same criminal incident does not violate due process if the inconsistency is not relevant to proving the defendants' guilt and the arguments are premised on different evidence admitted in each trial.

[2] Criminal Law – Trial – Irregularities – Mistrial – Factors. A trial court irregularity does not necessitate a mistrial unless it so prejudiced the defendant that nothing short of a new trial could ensure that the defendant receives a fair trial. The impact of the irregularity is determined by considering the record as a whole, including the seriousness of the irregularity, its cumulative nature, and the effect of curative instructions.

[3] Evidence – Relevance – Balancing Relevance and Prejudice – Review. Determinations that evidence is relevant under ER 401 and that its probative value is not substantially outweighed by the danger of unfair prejudice under ER 403 are reviewed only for a manifest abuse of discretion.

[4] Criminal law – Discovery – Scope – Materiality – Proof. A criminal defendant's right of discovery is limited to information which is material to the preparation of his defense. A denial of discovery is not error if the defendant shows only a possibility that an item of undisclosed evidence might aid his defense or might affect the outcome of the trial.

[5] Homicide – Jury – Death Penalty – Opposition – Disqualification – Validity. A prospective juror who states that he could not vote for the death penalty even if the State proves that death is the proper sentence under the facts and the law is actually biased under RCW 4.44.170(2) and is subject to a challenge for cause.

[6] Criminal Law – Jury – Sequestration – Discretion of Court – Review. The sequestration of a jury before it begins its deliberations is a decision within the trial court's broad discretion. A denial of sequestration is not error unless the nature of the publicity during the trial or the jury's exposure to the publicity created a probability of prejudice.

[7] Witnesses – Cross Examination – Scope – Review. A trial court limitation on the scope of cross examination is review only for a manifest abuse of discretion.

[8] Witnesses – Redirect examination – Scope. Matters first revealed during cross examination are subject to exploration on redirect examination limited only by the scope of the cross examination.

[9] Appeal and Error – Findings Of Fact – Review – Constitution Rights. When reviewing a finding of fact which implicates a constitutional right, an appellate court will examine the record independently of the trial court's findings.

[10] Searches and Seizures – Consent – Voluntariness – Determination. The voluntariness of a consent to search is a factual issue which is resolved by evaluating the totality of the circumstances.

[11] Searches and Seizures – Warrant – Affidavit – Sufficiency – Review. A magistrate's determination that the facts set forth in an affidavit were sufficient to establish probable cause to search is accorded considerable deference on appeal.

[12] Evidence – Opinion Evidence – Expert Testimony – Review. A trial court's decision regarding the admissibility of expert testimony under ER 702 is reviewed only for an abuse of discretion.

[13] Criminal Law – Evidence – Implicating Another – Foundation. A criminal defendant may not raise the issue of another person's involvement in the crime charged absent some admissible evidence linking that other person with the crime.

[14] Criminal Law –Punishment–Death Penalty – Special Sentencing Procedure – Mitigating Circumstances –

Proof. During the special sentencing phase of a capital case, the defendant's proffered evidence is not admissible unless it in some way is relevant to or probative of a circumstance in mitigation of punishment.

[15] Evidence -- Objection -- Specific Grounds--Necessity. A party who objected to the admission of evidence on one ground at trial may not on appeal assert a different ground for excluding the evidence.

[16] Criminal Law -- Punishment -- Death Penalty -- Special Sentencing Procedure -- New Jury -- Necessity. Under RCW 10.95.050, a jury's exposure to admissible evidence during the guilt finding phase of a capital case is not a basis for impaneling a nev jury for the sentencing phase of the case.

[17] Criminal Law -- Punishment -- Death Penalty -- Proportionality -- Mercy to Coperpetrator -- Effect. The fact that an accomplice to an aggravated first degree murder is not sentenced to death does not render the defendant's death sentence excessive or disproportionate to the penalty imposed in similar cases in violation of RCW 10.95.130(2)(b) if the mitigating evidence

involving each of the defendant's character, record, and role in the crime is different.

[18] Criminal Law – Punishment – Death Penalty – Special Sentencing Procedure – Misconduct of Prosecutor – Burden of Proof. A defendant challenging a statement made by a prosecutor during the sentencing phase of a capital case has the burden of proving that the statement was improper and that there is a substantial likelihood that it affected the jury's finding of a lack of mitigating circumstances meriting leniency.

[19] Criminal Law – Punishment – Death Penalty – Special Sentencing Procedure – Right of Allocution. The right of allocution guaranteed by former CrR 7.1(a) is satisfied in the sentencing phase of a capital case if the defendant is allowed to speak on his own behalf to the jury before closing arguments and to the trial court before the imposition of sentence.

[20] Criminal Law – Punishment – Death Penalty – Special Sentencing Procedure – Opening Statement – Right of State. By choosing not to present additional evidence during the sentencing phase of a capital case, the State

does not waive its right under RCW 10.95.060(2) to make an opening statement to the jury.

[21] Criminal Law – Right to Counsel – Effective Assistance of Counsel – Burden of Proof. A criminal defendant claiming that his trial counsel was ineffective must prove that his counsel made errors which, considering the entire record, deprived him of a fair trial.

[22] Trial – Instructions – Omission – Considered as a whole. The omission of a particular instruction is not error if the instructions considered as a whole adequately inform the jury of the applicable law.

[23] Criminal Law – Trial – Verdict – Unanimity – Failure To Instruct – Polling Jury – Effect. The absence of an instruction requiring a unanimous verdict in a criminal prosecution is harmless if the jury was polled and each juror acknowledged his agreement with the verdict.

[24] Homicide – First Degree Murder – Aggravating Circumstances – Multiple Counts – Verdict Form. In a prosecution for multiple counts of aggravated first

degree murder, the submission of a single special verdict form for the jury to indicate its findings as to the existence of aggravating circumstances for all the counts is not error so long as the instructions specify the requirement of juror unanimity as to the presence of any aggravating circumstance with respect to each of the counts.

[25] Homicide – First Degree Murder – Accomplice Liability – Applicability. Guilt to the crime of premeditated murder in the first degree (RCW 9A.32.030(l)(a)) can be predicated on accomplice principles under RCW 9A.08.020.

[26] Criminal Law – Lesser Included Offense – Instruction – Necessity – Harmless Error. The absence of a lesser included offense instruction which is supported by the evidence in not reversible error if the instruction was not requested and would have conflicted with the defendant's theory of the case.

[27] Appeal and Error – Review – Issues Not Raised in Trial Court – Instructions. An instruction which is not

excepted to at trial becomes the law of the case and may not be challenged on appeal.

[28] Trial – Instructions – Statutory Language. As a general rule, it is proper for an instruction to incorporate the language of a statute.

[29] Criminal Law – Punishment – Death Penalty – Special Sentencing Procedure – Mitigating Circumstances – Presumption. In the sentencing phase of a capital case, no presumption arises that there are sufficient mitigating circumstances to merit leniency.

[30] Trial – Instructions – Comment on Evidence – Test. An instruction does not constitute a prohibited comment on the evidence unless it conveys to the Jury the personal attitude of the trial judge toward the merits of the action.

[31] Criminal Law – Punishment – Death Penalty – Special Sentencing Procedure – Mitigating Circumstances – Supreme Court Review. In reviewing under RCW 10.95.130(2)(a) a jury's finding in the sentencing phase of a capital case that there were insufficient mitigating

circumstances to merit leniency, the Supreme Court considers the evidence most favorably to the State and determines whether any rational trier of fact could have found beyond a reasonable doubt that the evidence was sufficient to support the finding.
Utter and Pearson, JJ., dissent in part by separate opinion.

Nature of Action: Prosecution for aggravated first degree murder and first degree assault. The State claimed that the defendant had planned, supervised, and helped carry out the armed robbery and murder of 13 patrons and employees of a gambling club.

Superior Court: The Superior Court for King County, No. 83-1-00504-0, Frank D. Howard, J., on October 19, 1983, entered a judgment on a verdict of guilty of the charges and a sentence of death.

Supreme Court: Holding that none of the activity complained of in the defendant's 52 assignments of error constituted prejudicial error, the court affirms the conviction and sentence.

Raymond H. Thoenig, James E. Lobsenz, and Eric J. Nielsen of Washington Appellate Defender Association, for appellant.

Norm Maleng, Prosecuting Attorney, and Robert S. Lasnik and William L. Downing, Senior Deputies, for respondent.

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IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

NO. 49966-7
EN BANC

Filed: April 24, 1986

STATE OF WASHINGTON

Respondent,

v.

KWAN FAI MAK,

Appellant.

Anderson, J.–

FACTS OF CASE

In a crime which set a new gauge for cowardly murder in this state, the Wah Mee Club,in downtown Seattle's International District was robbed and all of its patrons and employees were shot in the head. The three armed people who perpetrated this deed held up the club at gunpoint, hogtied and robbed the men and woman in the club and then systematically shot each of them in the head as they lay bound and helpless. Twelve died there on the floor of the Wah Mee Club; one succumbed shortly afterwards at Harborview Hospital; and the fourteenth victim survived to identify the perpetrators, including the defendant, Kwan Fai Mak, whom he knew.

The evidence presented at trial overwhelmingly established that Mak planned, supervised and helped commit the

armed robbery and systematic murder in cold blood of 13 human beings to cover up the robbery of an establishment where he was known.

The jury convicted the defendant of all 13 counts of aggravated murder in the first degree and the 1 count of assault in the first degree with which he was charged. In the special sentencing proceeding which followed conviction, the same jury also unanimously determined beyond a reasonable doubt that no sufficient mitigating circumstances existed to merit leniency. In accordance with this state's capital punishment law, enacted in 1975 by the people as Initiative 316, the trial judge then sentenced the defendant to be executed.

We have reviewed the entire record of the 2-week trial and have considered the almost 1,000 pages of appellate briefs filed in this case. We conclude that the defendant was fairly tried, convicted and sentenced under the law and affirm the conviction on all counts and the sentence of death.

The case in before us on mandatory review pursuant to RCW 10.95.100.

ISSUES

There being 52 assignments of error raising as many issues, each issue will be set out at the same place in the opinion as our decision with respect to that issue, rather than setting all the issues out together at this point in the opinion. For the

convenience of counsel, and to avoid unnecessary confusion, we have endeavored to discuss the issues as nearly as possible in the order in which the defendant raised them.

DECISION

ISSUE ONE. Did the deputy prosecuting attorney, in closing argument during the guilt phase of the trial, present a theory of the case inconsistent with the one presented at the separate trial of one of the other perpetrators of the crime, Benjamin Kin Ng?

CONCLUSION. The record clearly demonstrates that the deputy prosecuting attorney in closing argument at the end of the guilt phase of the case did not present a theory of the case inconsistent with the one presented at the other defendant's trial.

In closing argument, a prosecutor has wide latitude to draw and express reasonable inferences from the evidence.[1] Challenges to remarks made in final argument must be judged in the context in which they are made.[2] Moreover, the trial court has broad discretion in determining whether the challenged

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[1]*State v. Rose*, 62 Wn.2d 309, 312, 382 P.2d 513 (1963); *State v. Harvey*, 34 Wn. App. 737, 739, 664 P.2d 1281 (1983).

[2]*State v. Kroll*, 87 Wn.2d 829, 836, 558 P.2d 173 (1986); *State v. Papadopoulos*, 34 Wn. App. 397, 400-01, 662 P.2d 59 (1983).

portion of the argument affected the jury's verdict, and the burden of showing prejudicial error is on the defendant.[3]

The defendant claims that at Benjamin Ng's trial the State argued it was Benjamin Ng who held the murder weapon and fired the fatal shots, whereas the State argued in the trial of the present case that it was the defendant Mak who held the same weapon and fired the fatal shots. This, argues the defendant, deprived him of his right to due process. This argument proceeds from a factually incorrect basis and the defendant Mak was not denied due process.

This same contention was made by Benjamin Ng in his appeal. In ruling there was no prejudice or deprivation of due process in that case, we hold as follows:[4]

> In both trials the prosecutor argued one basic theory. He maintained that Mak was the master planner who recruited his reliably ruthless friend Ng to help him carry out his plan. The prosecutor also emphasized in both trials that to convict the defendant of aggravated murder, the jury need not determine who actually fired the shots that killed the victims. In Ng's trial, the prosecutor did argue that Ng fired the Ruger. Contrary to Ng's assertion, however, the prosecutor at Mak's trial never argued that Mak fired that gun.

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[3] *Harvey*, at 740.

[4] *State v. Benjamin Ng*, 104 Wn.2d 763, 777-78, 713 P.2d 63 (1985); *see also* 768-70.

> A review of the record indicates that, arguably, the prosecutor presented one factual inconsistency at the two trials. In Ng's trial, the prosecutor argued that the Ruger was Ng's; and, in Mak's trial, he argued that Mak purchased the gun. Even if these arguments are inconsistent, the inconsistency has no bearing on the basic issues at trial. Furthermore, unlike Ng, Mak testified at his trial, placing a new body of evidence on the record. To require the prosecutor to make identical arguments when the record contains different evidence contradicts the well established proposition that a prosecutor may argue reasonable inferences from the facts presented at trial. *See State v. Kroll*, 87 Wn.2d 829, 846, 558 P.2d 173 (1976).

That holding is dispositive of this issue.

ISSUE TWO. Did the trial court err in denying defendant's motion for a mistrial based on a question asked by a deputy prosecuting attorney during cross examination of a defense expert witness?

CONCLUSION. Considering the record as a whole, and bearing in mind that any information the jury may have derived from the question was merely cumulative on the issue of who did the shootings, and that the question went unanswered, we conclude that the defendant was not prejudiced by the question.

At trial the defense called Dr. Phillip Lindsay, a Seattle psychiatrist, as a witness. This witness had testified at the earlier trial of Benjamin Ng that Ng suffered from dementia.

On cross examination, as the deputy prosecutor was questioning Dr. Lindsay concerning the basis of his diagnosis of Ng, the following colloquy occurred:

> Q. [Deputy Prosecutor] You took a history from [Benjamin Ng] in regards to head injuries?
> A. [Dr. Lindsay] Yes.
> Q. And you discussed other aspects of his life with him?
> A. Yes.
> Q. In terms of making your diagnosis?
> A. Right.
> Q. And . . . [Ng] told you that it was . . . [the defendant Mak] who shot the people at the . . . [club], didn't he?

At this point defense counsel objected to the question, asked the court to strike it and reserved a notion for mistrial to be argued at the conclusion of the witness' testimony. The trial court sustained the defendant's objection.

After the witness ended his testimony, the jury was excused and the trial court considered the mistrial motion. The court asked the doctor if he had based his diagnosis of the codefendant on statements the codefendant made as to the massacre. The doctor answered in the affirmative. The trial court then denied the defendant's motion for mistrial. The trial proceeded and the question that was originally objected to was neither answered nor ordered stricken by the court.

The defendant claims that this question placed Benjamin Ng's testimony before the jury and violated his (Mak's) constitutional right to confront his accuser.

Since the trial judge is in the best position to make first hand observations, he or she is accorded wide discretion in dealing with trial irregularities.[5] The trial court should grant a mistrial only when the defendant has been so prejudiced that nothing short of a new trial can insure that the defendant will be tried fairly. Only errors affecting the outcome of the trial will be deemed prejudicial.[6]

In determining whether a trial irregularity prejudiced the jury so as to deny the defendant his right to a fair trial, we will consider: (1) the seriousness of the irregularity; (2) whether the statement at issue was cumulative evidence; (3) whether the jurors were properly instructed to disregard the remarks of counsel not supported by the evidence; and (4) whether the prejudice was so grievous that nothing short of a new trial could remedy the error.[7]

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[5]*State v. Weber*, 99 Wn.2d 603, 612, 590 P.2d 809 (1979); *State v. Taylor*, 60 Wn.2d 32, 42, 371 P.2d 617 (1962).

[6]*State v. Weber*, 99 Wn.2d 158, 165, 659 P.2d 1102 (1983), quoting *Gilcrist*, at 612; *State v. Hightower*, 36 Wn. App. 536, 547, 676 P.2d 1016 (1984). *See State v. Davenport*, 100 Wn.2d 757, 761-62, 675 P.2d 1213 (1984).

[7]*Weber*, at 165-66.

We cannot conclude that the trial court erred when it denied the defendant's mistrial notion. First, the seriousness of any irregularity was not major. The question was never answered. We perceive no prosecutorial bad faith in asking the question since hearsay statements are generally admissible for purposes of medical diagnosis.[8] Second, it was cumulative on the issue of whether the defendant participated in the shootings. At this point in the trial, evidence had already been presented in the State's case by an interrogating police officer that the defendant (Mak) had told him that he (Mak) was the one who shot all of the victims.

Third, although it would perhaps have been better had the trial court stricken the question or instructed the jury to disregard it at the time nonetheless at the end of the trial the trial court did instruct the jury to disregard all remarks that were not intended as evidence. The jurors are presumed to have followed that instruction.[9]

Finally, before ruling on the motion for mistrial, the trial court fully heard and considered argument by both counsel on the probable impact the unanswered question had on the jury.

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[8]ER 803(4).

[9]*Weber*, at 166.

The record supports the trial court's decision that the defendant was not so prejudiced that he was denied a fair trial.[10]

ISSUE THREE. Did the trial court err in admitting into evidence the firearm seized pursuant to search warrants from the defendant's bedroom and from the bedroom of his confederate, Benjamin Ng?

CONCLUSION. The trial court did not abuse its discretion in ruling that the firearms were relevant to the issues of intent and premeditation.

The defendant argues that it was reversible error for the trial court to admit firearms into evidence that were apparently not used in the Wah Mee robbery and murders. He argues that such evidence was prejudicial, inflammatory and violated his constitutional right to bear arms in self-defense.

The admission of relevant evidence in within the sound discretion of the trial court and will not be reversed absent a manifest abuse of that discretion.[11] Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more

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[10]*State v. Evans*, 96 Wn.2d 1, 5, 633 P.2d 83 (1981); *Hightower*, at 547. *See Davenport*, at 761 n.1.

[11]*Peterson v. State*, 100 Wn.2d 421, 439, 671 P.2d 230 (1983); *Goodell v. ITT-Federal Support Servs., Inc.*, 89 Wn.2d 488, 493, 573 P.2d 1292 (1978); *Maicke v. RDH, Inc.*, 37 Wn. App. 750, 752, 683 P.2d 227 (1984).

probable or less probable than it would be without the evidence."[12] Moreover, the trial court may exclude relevant evidence if its probative value is substantially outweighed by the danger of unfair prejudice.[13] Such determinations are left to the sound discretion of the trial court.[14] Facts tending to establish a party's theory of the case will generally be held to be relevant.[15]

Here, the firearms in question were directly relevant to the issues of intent and premeditation and their probative value outweighed any prejudicial effect. They linked the defendant to Benjamin Ng (Mak had sold guns to Benjamin Ng) and demonstrated the defendant's accessibility to weaponry, a relevant matter in light of the testimony in the case. Moreover, under the facts as testified to, the firearms were probative an to who planned the robbery and murders. Any possibility of undue prejudice was dispelled by the defendant's own testimony wherein he admitted involvement in various illegal activities

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[12]ER 401.

[13]ER 403.

[14]*State v. Coe*, 101 Wn.2d 772, 782, 684 P.2d 668 (1984).

[15]*Fenimore v. Donald M. Drake Constr. Co.*, 87 Wn.2d 85, 89, 549 P.2d 483 (1976); *Maicke*, at 752.

including illegal firearm sales. There was no error, evidentiary or constitutional, in admitting the firearms into evidence.

State v. Rupe, 101 Wn.2d 664, 683 P.2d 571 (1984), relied on by the defendant, in distinguishable. There, firearms owned by the defendant were admitted into evidence at the penalty phase of a capital case. They had no relationship to the crime committed. The State also presented the testimony of several firearms experts. From this the State argued the defendant's dangerousness an a reason to impose the death penalty. In the present case, unlike *Rupe*, there was no argument "that defendant's exercise of that constitutional right (to bear arms) meant that he deserved the death penalty . . ." *Rupe*, at 707.

ISSUE FOUR. Did the trial court err when it denied defendant's discovery request for approximately 800 pages of materials in the Seattle Police Department's internal investigation files?

CONCLUSION. The defendant's claim that the materials in question may have led to evidence critical to his defense was insufficient to establish a showing of materiality that would have compelled the trial court to grant the request.

During a pretrial hearing, the defendant requested that the State turn over these files. The State answered that it had turned over all of the discoverable material from the file. The

trial court conducted a "spot check" in camera review of the materials in question and when that bore out the State's assertions, it denied the request.

The defendant now claims that the trial court's failure to preserve the files contravenes the discovery rules and denies him his right to appeal.

The prosecuting attorney is under a duty to disclose and to preserve evidence that is material and favorable to the defendant and failure to do so will generally be held to violate the accused's constitutional right to a fair trial.[16] Additionally, however, the scope of discovery is within the sound discretion of the trial court and will not be disturbed absent a manifest abuse of that discretion.[17]

If an accused requests further disclosure, he must show that the requested information is material to the preparation of the accused's defense.[18] The mere possibility that an item of undisclosed evidence might have helped the defense or might

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[16]*Brady v. Maryland*, 373 U.S. 83, 87, 10 L. Ed. 2d 215, 83 S. Ct. 1194 (1963); *State v. Coe*, 101 Wn.2d 772, 783, 684 P.2d 668 (1984); *State v. Renfro*, 28 Wn. App. 248, 251, 622 P.2d 1295 (1981), *aff'd* 96 Wn.2d 902, 639 P.2d 737, *cert. denied*, 459 U.S. 842, 74 L. Ed. 2d 86, 103 S. Ct. 94 (1982); CrR 4.7.

[17]*State v. Lauterbach*, 33 Wn. App. 161, 168, 653 P.2d 1320 (1982).

[18]CrR 4.7(e)(1).

have affected the outcome of the trial, however, does not establish "materiality" in the constitutional sense.[19]

Our review of the record in this case demonstrates the speculative nature of the defendant's claim concerning the files sought. He made no showing that the requested information was material to his defense. To the contrary, his claim is that the files "may have contained information critical to the defense"[20] or "might lead to other evidence.[21] This is not sufficient to establish a showing of materiality such as to compel the court to grant a discovery request.[22] Moreover, nothing at trial suggested the availability or withholding of any exculpatory information that could have affected the outcome of the trial.[23] That being so, the trial court was not required to conduct an in camera review of the Seattle Police Department's internal investigative files, and it is not necessary for this court to address the assigned error questioning the propriety of the in

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[19]*United States v. Agurs*, 427 U.S. 97, 112-13, 49 L. Ed. 2d 342, 96 S. Ct. 2392 (1976); *State v. Gerber*, 28 Wn. App. 214, 218, 622 P.2d 888 (1981); *State v. Hudspeth*, 22 Wn. App. 292, 294, 593 P.2d 548 (1978). *Cf. State v. Dictado*, 102 Wn.2d 277, 298-99, 687 P.2d 172 (1984).

[20]Opening Brief of Appellant, at 122.

[21]Opening Brief of Appellant, at 129.

[22]*See State v. Gerber, supra.*

[23]*See Dictado*, at 298.

camera review and the record made thereof. The trial court did not abuse its discretion in denying the defendant's discovery request.

ISSUE FIVE. Did the trial court err in excusing a prospective juror for cause because the juror could not impose the death penalty?

CONCLUSION. The trial court properly ascertained that the prospective juror in question held an actual bias against the death penalty, and did not abuse its discretion in granting the State's challenge to the juror for cause.

During voir dire examination, the following colloquy occurred with the juror who was excused for cause:

> Q. [The Court]: If we get to the penalty phase, one of the penalties that will be considered is death. How would you best describe your feelings about the death penalty? . . .
>
> . . .
>
> A. [Prospective Juror]: I'm a Christian and as I've studied the life of Christ . . . I have come to the conclusion that I could not push the button myself, I'm sure.
>
> Q. If you sat as a juror and went back to the jury room, and you were convinced beyond a reasonable doubt that the State had proven death was the proper sentence under the facts and under the law, could you answer that question Yes?
>
> A. No.

The prospective juror was then excused.

The defendant claims that by excluding this prospective juror for cause because of her inability to impose the death penalty due to her religious beliefs, the trial court violated Const. art. 1, § 11 which prohibits exclusion of a juror "in consequence of his opinion on matters of religion . . ."

The Legislature has provided that either party to an action may excuse a prospective juror by peremptory challenge or for cause.[24] Challenges for cause may be either general or particular.[25] Particular causes of challenge can be for: (1) "such a bias as when the existence of the facts is ascertained, in judgment of law disqualifies the juror" (implied bias);[26] (2) "the existence of a state of mind on the part of the juror in reference to the action . . . which satisfies the court that the challenged person cannot try the issue impartially and without prejudice to the substantial rights of the party challenging" (actual bias);[27] (3) or the existence of a physical defect that would render the

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[24]RCW 4.44.130.

[25]RCW 4.44.150.

[26]RCW 4.44.170(1).

[27]RCW 4.44.170(2).

juror incapable of performing his or her duties without prejudicing the substantial rights of the party challenging.[28]

If the trial court determines that a prospective juror is actually or impliedly biased, then that juror must be excused for cause.[29] However, a juror with preconceived ideas need not be disqualified if he or she can "'put these notions aside and decide the case on the basis of the evidence given at the trial and the law as given him by the court.'"[30]

The law in this state is settled; a trial court does not abuse its discretion by excusing a prospective juror for cause in a capital case when the prospective juror will not impose the death penalty.[31] In determining whether a prospective juror was properly excused for cause because of his or her inability to impose the death sanction, reviewing courts focus on whether the

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[28]RCW 4.44.170(3).

[29]*State v. Gosser*, 33 Wn. App. 428, 433, 656 P.2d 514 (1982); *see* RCW 4.44.170; CrR 6.4(c)(1).

[30]*Gosser*, at 433, *quoting State v. White*, 60 Wn.2d 551, 569, 374 P.2d 942 (1962), *cert. denied*, 375 U.S. 883, 11 L. Ed. 2d 113, 84 S. Ct. 154 (1963); RCW 4.44.190.

[31]*State v. Jeffries*, 105 Wn.2d 398, 411, ___ P.2d ___ (1986); *State v. Leuch*, 198 Wash. 331, 335-37, 88 P.2d 440 (1939); *see Witherspoon v. Illinois*, 391 U.S. 510, 520, 20 L. Ed. 2d 776, 88 S. Ct. 1770 (1968).

juror holds an actual or an implied bias.[32] In rejecting an argument like the one made here, this court in State v. Leuch, 198 Wash. 331, 336-37, 88 P.2d 440 (1939), quoting People v. Rollins, 179 Cal. 793, 797, 179 P. 209 (1919), observed:

> Certainly the constitutional provision cannot be held to preclude legislation reasonably looking to the exclusion by challenge from a jury in any case of any person whose mind is in such condition from any cause whatever that he cannot try and determine the cause in accord with the law applicable thereto.[33]

The portion of the record quoted shows that the prospective juror in the instant case demonstrated actual bias against the death penalty.[34] The court asked the juror if she could impose the death penalty and she responded in the negative. The trial court did not err in removing the juror for cause.[35]

ISSUE SIX. Did the trial court err in denying defendant's motion to sequester the jury during the entire trial?

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[32]*See Wainwright v. Witt*, ___ U.S. ___, 83 L. Ed. 2d 841, 105 S. Ct. 844 (1985); *State v. Smith*, 74 Wn.2d 744, 779, 446 P.2d 571 (1968), *vacated in part*, 408 U.S. 934, 33 L. Ed. 2d 747, 92 S. Ct. 2852 (1972); *Leuch*, at 335-37.

[33]*See also People v. Fields*, 35 Cal. 3d 329, 673 P.2d 680, 197 Ca. Rptr. 803 (1983), *cert. denied*, ___ U.S. ___, 83 L. Ed. 2d 204, 105 S. Ct. 267 (1984).

[34]*See* RCW 4.44.170(2).

[35]*See State v. Jeffries, supra*; *State v. Leuch, supra*; *State v. Gosser, supra*.

CONCLUSION. Given the extensive protective measures the trial court used to insure that the jurors were not prejudiced by the publicity on the case, the trial court did not abuse its discretion when it allowed the jury to separate prior to commencing deliberations.

The defendant argues that the newspaper coverage of this case was sensational, inflammatory, uninterrupted and massive; and that the trial court, therefore, abused its discretion in allowing the jury to separate prior to retiring to deliberate on the verdict.

In this state, a trial judge has broad discretion in determining whether or not a jury should be sequestered during the trial, prior to deliberations.[36] For a defendant to claim abuse of that discretion, the record must indicate that either the nature of the publicity during the trial or the jury's exposure to that publicity created a probability of prejudice.[37]

The record is clear. The trial court took extensive measures to insure that the jury was not prejudiced by any outside publicity regarding the case. During jury selection, for example, the trial court itself conducted individual voir dire of

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[36]*Dictado*, at 299; *State v. Wixon*, 30 Wn. App. 63, 74, 631 P.2d 1033 (1981).

[37]*State v. Benjamin Ng*, 104 Wn.2d 763, 776, 713 P.2d 63 (1985); *Dictado*, at 299.

prospective jurors to determine the impact of pretrial publicity. It also required prospective jurors to answer detailed questionnaires aimed at assessing such impact. Once the trial began, the jurors were instructed daily that they were to avoid any exposure to media reports on the trial and the importance of this was repeatedly impressed upon them. Every day from arrival in the morning to dismissal at the end of the day, the jury was kept together under supervision of the bailiff. Finally, the jury was sequestered when it undertook deliberations on the guilt phase of the case and then throughout the penalty phase of the trial. Although this case did receive widespread media coverage both before and during the trial, the coverage was primarily factual and no showing has been made that the jury was actually exposed to any of it. The trial court did not abuse its discretion in declining to sequester the jury during this long trial prior to its beginning deliberations.[38]

ISSUE SEVEN. Did the trial court err in the rulings it made during cross examination of two witnesses for the State?

CONCLUSION. Although an accused in a criminal prosecution is afforded great latitude in cross-examining State's witnesses to show bias, the scope of such cross examination remains within the sound discretion of the trial court and the trial

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[38]*See Wixon*, at 74.

court's ruling will not be disturbed absent a showing of abuse. Under the facts, no such abuse was shown here.

At trial, the defendant proposed to cross-examine two of the State's witnesses as to their participation with the defendant in an alleged 1981 robbery. The defense hoped to thereby establish that these witnesses were accorded favorable treatment by the treatment by the authorities in exchange for their testimony in this trial.

The proposed defense cross examination of the first witness would have revealed that after he provided the police with information as to the defendant's attempt to recruit him for the Wah Mee robbery and killings, he then confessed to a 1981 robbery involving both himself and the defendant. The trial court ruled that the cross examination of this witness as to his motives in providing information to the police would open the door to redirect examination concerning the context in which he initially provided the information. This would have allowed the State, on redirect, to question the witness with respect to the 1981 robbery. Because of this ruling, defense counsel did not cross-examine this witness as to his motives for testifying.

As to the second witness, the proposed defense cross examination would have revealed that several months after providing police with information connecting the defendant to the Wah Mee massacre, he too admitted his involvement with the

defendant in the 1981 robbery. The trial court ruled that the proffered cross examination was an "insufficient foundation to establish bias", and was, therefore, irrelevant.

The defendant assigns error to the trial court's ruling that impeachment of these two prosecution witnesses would open the door to evidence on redirect that the defendant participated in the uncharged robbery.

The scope of cross examination lies within the sound discretion of the trial court and will not be disturbed absent a manifest abuse of that discretion.[39] The accused in a criminal prosecution is, of course, afforded considerable latitude in cross-examining an essential state witness to show bias,[40] and has the right to cross-examine a witness to elicit facts showing the witness' bias, prejudice or interest.[41]

As this court held in an analogous situation in *State v. Gefeller*, 76 Wn.2d 449, 455, 458 P.2d 17 (1969), however:

> It would be a curious rule of evidence which allowed one party to bring up a subject, drop it

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[39]*State v. Campbell*, 103 Wn.2d 1, 20, 691 P.2d 929 (1984), *cert. denied*, ___ U.S. ___, 85 L. Ed. 2d 526, 105 S. Ct. 2169 (1985); *State v. Knapp*, 14 Wn. App. 101, 107-08, 540 P.2d 898 (1975); ER 611.

[40]*Knapp*, at 107-08, *citing State v. Tate*, 2 Wn. App. 241, 247, 469 P.2d 999 (1970).

[41]*Knapp*, at 108, *citing State v. Robbins*, 35 Wn.2d 389, 396, 213 P.2d 310 (1950).

> at a point where it might appear advantageous to him, and then bar the other party from all further inquiries about it. Rules of evidence are designed to aid in establishing the truth. To close the door after receiving only a part of the evidence not only leaves the matter suspended in air at a point markedly advantageous to the party who opened the door, but might well limit the proof to half-truths. Thus, it is a sound general rule that, when a party opens up a subject of inquiry on direct or cross-examination, he contemplates that the rules will permit cross-examination or redirect examination, as the case may be, within the scope of the examination in which the subject matter was first introduced.

(Citations omitted. Italics ours.) The trial court did not abuse its discretion in ruling as it did.[42]

ISSUE EIGHT. Did the trial court err when it denied defendant's motion to suppress evidence seized during a search of the defendant's bedroom pursuant to a search warrant?

CONCLUSION. The trial court carefully weighed the testimony and found as a fact that the police had valid consent when they initially entered the defendant's home and bedroom. The subsequent issuance of the search warrant was, therefore, proper and the trial court did not err when it declined to suppress the evidence obtained as a result of the search conducted pursuant to the search warrant.

The defendant argues that the consent to search the defendant's bedroom was not given freely or voluntarily; thus,

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[42]*See Knapp*, at 107-08; ER 403; ER 611.

he claims that the evidence seized pursuant to the search warrant was obtained by exploitation of the prior illegality, namely invalid consent, and should be suppressed. We disagree.

On this issue, the trial court found the following facts:

> The officers knocked on the door which was opened by defendant's father. Defendant's brother soon appeared. Sergeant Sanford showed his badge, briefly informed the two individuals in the residence of the homicides and the fact that he was looking for Kwan Mak and Benjamin Ng. He asked if they could come in. In response to this the father opened the door further and nodded. The brother made a response indicating in the affirmative.

Finding of fact 7.

> Once inside, the officers asked if defendant or Ben Ng were present. The brother responded that Ben Ng was not but that he wasn't sure if defendant was.

Finding of fact 8.

> Once inside, Sergeant Sanford asked if they could check to verify defendant's presence or absence. The father indicated assent, pointed out the bedroom of defendant, and said "Willie".

Finding of fact 9.

> Sergeant Sanford opened the door and entered the bedroom and patted down the bulging bedcovers. While in the room he observed in plain view a holstered handgun and what appeared to be a large amount of cash.

Finding of fact 10.

Reviewing courts place considerable weight on trial court's findings of fact, especially when the findings arise out of

contradictory testimony.[43] Nevertheless, the reviewing court will make its own independent examination of the record when fundamental constitutional rights are involved.[44] The search of property, without a warrant and without probable cause, but with proper and voluntary consent, is valid under the Fourth Amendment.[45] Whether the consent was given freely or not is a question of fact to be determined by the totality of the circumstances,[46] and the burden is on the State to show by clear and convincing evidence that the consent was informed and given freely and voluntarily.[47]

The trial court heard and believed the testimony of the investigating detective and, based on that testimony and reasonable inferences therefrom, found that consent to enter the house and bedroom was freely given. Moreover, only "plain view" observations were thereafter made until the search warrant

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[43]*McNear v. Rhay*, 65 Wn.2d 530, 535, 398 P.2d 732 (1965).

[44]*McNear*, at 535.

[45]*State v. Mathe*, 35 Wn. App. 572, 576, 668 P.2d 599 (1983). *See McNear*, at 535; *State v. Rodriguez*, 32 Wn. App. 758, 763, 650 P.2d 225 (1982).

[46]*Schneckloth v. Bustamonte*, 412 U.S. 218, 36 L. Ed. 2d 854, 93 S. Ct. 2041 (1973); *Mathe*, at 576.

[47]*State v. Shoemaker*, 85 Wn.2d 207, 210, 533 P.2d 123 (1975); *Mathe*, at 576.

was issued. Based on our review of the record, we conclude that the totality of circumstances support the trial court's findings.[48]

ISSUE NINE. Did the trial court err in ruling that the search warrant affidavit contained no material misrepresentation?

CONCLUSION. The affidavit in support of the search warrant did not contain material misrepresentations. The search warrant proper and the trial court did not err by refusing to suppress the evidence obtained as a result of it.

The affidavit states that the sole survivor identified two of the gunmen as the codefendant and "an individual known to . . . [the sole survivor] by the . . . [defendant's] last name". A tape was made of this statement and was placed in evidence for the trial court to hear. After listening to the tape, the trial court concluded that the survivor did in fact state the defendant's name and declined to suppress the evidence obtained as a result of the search conducted pursuant to the warrant.

The defendant argues, however, that the tape establishes that the sole survivor identified another individual and that, therefore, the evidence recovered as a result of using the search warrant should be suppressed.

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[48] *See McNear*, at 535-37; *Mathe*, at 576-77.

An accused is entitled to challenge the validity of a search warrant affidavit.[49] The duty of the issuing judge is to determine whether probable cause exists to issue a warrant, and that determination will be accorded considerable deference by appellate courts.[50] Doubts will be resolved in favor of the search warrant.[51]

In this case, the trial court's decision to admit the evidence is independently supported by the defendant's own testimony. At trial the defendant admitted that he had listened to the tape and acknowledged that the survivor had used his last name. The showing made to the magistrate was sufficient and no abuse of discretion in issuing the search warrant was shown.[52] The search undertaken pursuant to the search warrant was valid.

ISSUE TEN. Did the trial court err in refusing to allow proffered expert testimony on eyewitness identification in the guilt phase of the trial?

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[49]*Franks v. Delaware*, 438 U.S. 154, 57 L. Ed. 2d 667, 98 S. Ct. 2674 (1978); *State v. Haywood*, 38 Wn. App. 117, 120, 684 P.2d 1337 (1984).

[50]*State v. Hightower*, 36 Wn. App. 536, 543, 676 P.2d 1016 (1984).

[51]*State v. Fisher*, 96 Wn.2d 962, 964, 639 P.2d 743, *cert. denied*, 457 U.S. 1137, 73 L. Ed. 2d 1355, 102 S. Ct. 2967 (1982).

[52]*See Hightower*, at 544.

CONCLUSION. The trial court did not err by declining to admit the testimony on eyewitness identification.

During the guilt phase of the trial, defense counsel offered to have a vitness testify as an expert concerning factors that can make eyewitness identification unreliable. In granting the State's notion to exclude this witness' testimony, the trial court appropriately observed that the "subject of the testimony is within the general knowledge and experience of a lay jury" and that cross examination of the eyewitness would reveal any inconsistencies.

The defense submitted an offer of proof outlining the offered testimony. It indicated that the witness would have testified that: (1) persons suffering from retrograde may not be aware of its existence; (2) a person experiencing gaps in memory or perception fills in the gaps in order to complete the logical picture within the mind; (3) suggestive questioning immediately following the incident influences the type of information the person uses to fill the gaps; (4) post-event information is also used by the person to fill the gaps; and (5) the subject's confidence in his version of the facts increases each time it is recalled and recounted to another.

The defendant argues that the trial court abused its discretion by not allowing the witness to testify and cites ER 702:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

The decision of whether or not to admit expert opinion evidence is within the discretion of the trial court,[53] and we will not disturb a discretionary ruling of this sort absent a showing of abuse.[54] There was no abuse shown here.

ISSUE ELEVEN. Did the trial court err in excluding, at both the guilt and penalty phases of the trial, evidence concerning a claimed accomplice of the defendant?

CONCLUSION. The trial court did not abuse its discretion in excluding this testimony.

At trial, defense counsel offered evidence that it is claimed would connect a third party to the crimes at the Wah Mee Club. The offer of proof consisted of the following: (1) a certain third party had a plan to control gambling in the International District; (2) that party contacted Benjamin Ng, one of the perpetrators of the crimes at the Wah Mee Club, on the day of the robbery and killings; (3) Benjamin Ng's car was at

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[53] *State v. Cook*, 31 Wn. App. 165, 174, 639 P.2d 863 (1982); *see State v. Guloy*, 104 Wn.2d 412, 705 P.2d 1182 (1985).

[54] *State v. Petrich*, 101 Wn.2d 566, 575, 683 P.2d 173 (1984). *See* ER 702.

that party's restaurant for an hour before the crime; (4) that party offered to sell Ng a bulletproof vest a week before the crime; (5) the party was a "banker" for an International District gambling club that had just closed down; and (6) an anonymous informant told police that this party directed young gang members.

The trial court ruled that the defendant's offer of proof did not connect the third party to the crime with "the necessary specific factual connection" to render it admissible.

The defendant argues that in ruling as it did the trial court deprived the jury of critical evidence at the guilt phase of the trial and therefore committed error.

Before a defendant can introduce evidence connecting another person with the crime charged, a proper foundation must be laid.[55] The rule is stated in State v. Downs, 168 Wash. 664, 667, 13 P.2d 1 (1932):

> Before such testimony can be received, there must be such proof of connection with the crime, such a train of facts or circumstances as tend clearly to point out someone besides the accused as the guilty party.

(Citations omitted.) The rationale for this rule is perhaps beat explained in a California case, *People v. Mendez*, 193 Cal. 39,

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[55] *State v. Jones*, 26 Wn. App. 551, 555, 614 P.2d 190 (1980), *citing*, *State v. Kwan*, 174 Wash. 528, 25 P.2d 104 (1933); *State v. Downs*, 168 Wash. 664, 13 P.2d 1 (1932).

52, 223 P. 65 (1924) cited with approval by this court in *State v. Kwan*, 174 Wash. 528, 533, 25 P.2d 104 (1933):

> It seems to us that there is a sound basis for this rule and that it rests fundamentally upon the same consideration which led to the early adoption of the elementary rules that evidence to be admissible must be both relevant and material. It rests upon the necessity that trials of cases must be both orderly and expeditious, that they must come to an end, and that it should be a logical end. To this end it is necessary that the scope of inquiry into collateral and unimportant issues must be strictly limited. It is quite apparent that if evidence of motive alone upon the part of other persons were admissible, that in a case involving the killing of a man who had led an active and aggressive life it might easily be possible for the defendant to produce evidence tending to show that hundreds of other persons had some motive or animus against the deceased; that a great many trial days might be consumed in the pursuit of inquiries which could not be expected to lead to any satisfactory conclusion.

The trial record reveals that several items that the defendant offered to prove did come to light through the testimony of other witnesses, but failed to support defense counsel's offer of proof. The only connection shown between the alleged "accomplice" and the crimes at the Wah Mee Club was a hearsay statement whereby this claimed accomplice offered to sell Benjamin Ng a bulletproof vest a week before the crimes were committed at the Wah Mee Club. Contrary to defendant's contention, this statement is hearsay because it was offered to

prove the truth of the matter stated – that the alleged accomplice offered to sell a bulletproof vest to Benjamin Ng.[56] The offer of proof did not satisfy the *Downs* test. Based on the lack of proper foundation, the trial court did not abuse its discretion by denying admission of the evidence.

During the special sentencing proceeding, the defendant again offered this same evidence, and again, the trial court excluded the evidence on relevancy grounds.

Defendant argues that in light of our holding in State v. *Bartholomew*, 101 Wn.2d 631, 645, 683 P.2d 1079 (1984) (*Bartholomew* II), the evidence should at least have been admitted in that phase of the trial. However, as *Bartholomew* II pointed out:

> The Washington capital punishment statute requires admission at the sentencing phase of "any relevant evidence which it deems to have probative value regardless of its admissibility under the rules of evidence . . ." RCW 10.95.060(3). We have restricted this provision to evidence in mitigation of punishment. *Therefore, only evidence which is not probative or not relevant is excluded at the sentencing phase.*

(Italics ours.)[57]

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[56] *See* ER 801(c); ER 802.

[57] *State v. Bartholomew*, 101 Wn.2d 631, 645, 683 P.2d 1079 (1984) (*Bartholomew* II). *See also State v. Rupe*, 101 Wn.2d 664, 691, 683 P.2d 571 (1984); *State v. Grisby*, 97 Wn.2d 493, 503, 647 P.2d 6 (1982), *cert. denied*, 459 U.S. 1211, 75 L. Ed. 2d 446, 103 S. Ct. 1205 (1983).

The defendant's proffered evidence in this regard was neither relevant nor probative.

ISSUE TWELVE. Did the trial court err when it allowed a police officer to testify that he was familiar with the defendant's last name prior to the crimes involved in this case?

CONCLUSION. We decline to review an argument based on one rule of evidence when the objection at trial was made on the basis of a different rule of evidence.

The police officer in charge of the investigation testified on redirect examination that he was familiar with the defendant's last name before he heard it mentioned in connection with this case. Defense counsel objected on the ground it was not relevant. In the context in which this came out, it was clearly relevant, and the trial court properly overruled the objection.[58] Now, the defendant argues that the trial court should have sustained the objection became it violated the rule excluding evidence of other crimes.[59] No objection was made at trial on this basis.

As we recently reiterated in *State v. Ferguson*, 100 Wn.2d 131, 138, 667 P.2d 68 (1983),

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[58]ER 401, 402.

[59]ER 404(b).

it is well established that

> [if] a specific objection is overruled and the evidence in question is admitted, the appellate court will not reverse on the basis that the evidence should have been excluded under a different rule which could have been, but was not, argued at trial.

5 K. Tegland, Wash. Prac., Evidence § 10, at 25 (2d ed. 1982); ER 103. The claimed error also does not warrant review as an error raised for the first time on appeal under RAP 2.5.

ISSUE THIRTEEN: Did the trial court err when it denied the defendant's motion for mistrial based on an improper remark made by one of the detectives who searched the defendant's bedroom?

CONCLUSION. Considering the record as a whole, and particularly the trial court's instruction to the jury to disregard the detective's remark, the defendant was not prejudiced.

At the beginning of the trial the defendant moved in limine to exclude any reference to marijuana found during the search of defendant's bedroom. The parties agreed that no such testimony would be presented. During the testimony of one of the detectives who searched the defendant's bedroom, however, he mentioned a "small baggie of green vegetable matter" found in the defendant's bedroom. Defense counsel objected and the jury was instructed to disregard it. The jury was excused and the deputy prosecutor apologized for the officer's violation of the trial court's ruling. Defense counsel's motion for a mistrial was denied.

Defendant argues that although this error may not by itself warrant a new trial, when taken in conjunction with numerous other errors it does warrant reversal. We disagree.

Again, the trial judge being in the best position to evaluate the potential prejudice of such a remark, the claimed error will be reviewed under the abuse of discretion standard.[60] As we read the record, the remark appears inadvertent. Furthermore, against the factual backdrop of this case, the mention of finding some "green vegetable matter" in the defendant's closet is not reversible error whether considered alone or in conjunction with other claimed errors. The defendant himself later testified that he wanted to be involved in drug dealing. As discussed previously, a mistrial should be granted only when a defendant has been so prejudiced that nothing short of a new trial can insure that he will be tried fairly.[61] No prejudice was shown in this case at any time.

ISSUE FOURTEEN. Should the trial court have impaneled a new jury for the penalty phase of the trial because, at the guilt phase of the trial, the jury heard evidence of the defendant's involvement in a committed but uncharged crime as

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[60]*State v. Weber*, 99 Wn.2d 158, 166, 659 P.2d 1102 (1983); *State v. Hightower*, 36 Wn. App. 536, 547, 676 P.2d 1016 (1984).

[61]*State v. Gilcrist*, 91 Wn.2d 603, 612, 590 P.2d 809 (1979).

well as about the planning of three other crimes which were never committed?

CONCLUSION. The capital punishment statutes mandate that the only time the trial court may impanel a new jury for the penalty phase is when unforeseen circumstances make it impracticable to reconvene the same jury. There were no such circumstances here; hence, error was not committed in this regard.

During the guilt phase of the trial, the State presented evidence of two planned robberies and a planned burglary where, according to the plans, witnesses were to be killed (but which crimes were never committed) and one robbery that was committed where the victim was bound by tape. According to this testimony, the defendant was implicated in all of these. The trial court concluded that such evidence was relevant and probative to the issues of the defendant's intent, knowledge and purpose in going armed to the Wah Mee Club, as well as to rebut his own testimony to the effect that he 'had no idea the robbery or killings would occur at the club. The trial court properly balanced and weighed the probative value of the evidence against its potential for prejudice before admitting it.[62]

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[62] *State v. Saltarelli*, 98 Wn.2d 358, 361-63, 655 P.2d 697 (1982).

Then, in the penalty phase of the trial, the trial court instructed the jury that it could consider all of the evidence previously admitted during the guilt phase. The defendant now challenges the use of this evidence during the penalty phase.

The capital punishment statutes require that if a defendant's guilt is determined by a jury, the same jury "shall" hear the penalty phase of the trial unless "unforeseen circumstances" make it impracticable to reconvene the same jury, in which event the trial court will impanel a new jury.[63] Absent contrary legislative intent, "shall" is mandatory.[64] Thus, absent foreseen circumstances, the trial court is required to reconvene the same jury for the penalty phase of the trial.[65]

The evidence in question related to the statutory aggravating circumstances found by the jury in the guilt phase of the case.[66] It was properly admitted in the guilt phase; therefore, it was admissible in the penalty phase.[67] Such

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[63]RCW 10.95.050(3), (4).

[64]*State ex rel. Nugent v. Lewis*, 93 Wn.2d 80, 82, 605 P.2d 1265 (1980).

[65]*State v. Bartholomew*, 98 Wn.2d 173, 224, 654 P.2d 1170 (1982) (Dolliver, J., concurring in part, dissenting in part) (*Bartholomew* I), *State's cert. granted*, 463 U.S. 1203, 77 L. Ed. 2d 1383, 103 S. Ct. 3530, *defendant's cert. denied*, 463 U.S. 1212, 77 L. Ed. 2d 1395, 103 S. Ct. 3548 (1983).

[66]*See* RCW 10.95.020(7); RCW 10.95.020(9)(a).

[67]*Bartholomew* II, at 643.

evidence did not constitute a showing of "unforeseen circumstances" requiring the impaneling of a new jury at the penalty phase of the case.

ISSUE FIFTEEN. Is the defendant's death sentence excessive or disproportionate to the penalty imposed in similar cases?

CONCLUSION. We hold that it is not.

In reviewing a defendant's death sentence, one of the things we are required to determine is "[w]hether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both *the crime and the defendant*." (Italics ours.) RCW 10.95.130(2)(b).

First, we consider "the crime". Insofar as the proportionality of this crime to other crimes is concerned, we need say only that so far as we have been able to ascertain, this is the largest mass premeditated murder in our state's history. The defendant does not seem to suggest otherwise. Instead, he argues that since at the penalty phase of the trial of his confederate in crime (Benjamin Ng) the jury could not unanimously agree[68] (thus sparing Benjamin Ng's life), it follows that his (Mak's) death penalty for the same crimes is disproportionate. This does not follow.

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[68] *State v. Benjamin Ng*, 104 Wn.2d 763, 713 P.2d 63 (1985).

Recently, in *State v. Kincaid*, 103 Wn.2d 304, 310-11, 692 P.2d 823 (1985), we summarized Washington law relating to the crime of aggravated first degree murder and the penalty therefor:

> The statute provides for a bifurcated procedure. At the first, the guilt phase of the trial, it is determined whether the defendant is guilty of premeditated murder in the first degree, and, if so, it is then determined whether one or more of the statutory aggravating circumstances exist. If the death penalty has not been asked [as it was not, in *Kincaid*], the defendant who is found guilty of premeditated murder in the first degree where one or more aggravating circumstances exist, is sentenced to life imprisonment without possibility of parole; but, if the death penalty is sought, the trial then shifts into a separate capital sentencing phase where it is determined whether there are sufficient mitigating circumstances to merit leniency and, if not, the death penalty is imposed.
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> Washington statutes thus provide three levels of punishment for persons convicted of premeditated first degree murder. Persons convicted of premeditated first degree murder alone are sentenced to life imprisonment with possibility of parole. Persons convicted of premeditated first degree murder, where one or more of the statutory aggravating circumstances are found, and the death penalty is not sought or obtained, are sentenced to mandatory life imprisonment. And persons convicted of premeditated first degree murder, where one or more of the statutory aggravating circumstances are found, and where the death penalty is sought, are sentenced to death if it is determined that there are not sufficient mitigating circumstances to merit leniency. It is the existence of one or more of the statutory aggravating circumstances which satisfies the constitutional imperative of narrowing the class of persons eligible for the death penalty and which justifies the imposition of the more severe sentence.

(Footnotes Omitted.)

It is important that at the penalty phase there be an individualized determination on the basis of the character of "the defendant" (*see* RCW 10.95.130(2)(b)) as well as on the basis of the circumstances of the crime.[69] It is the purpose of channeled discretion statutes, such as ours, to avoid the vice of failing "to allow the particularized consideration of relevant aspects of the character and record of each convicted defendant before the imposition upon him of a sentence of death."[70]

As observed in *State v. Campbell*, 103 Wn.2d 1, 40, 691 P.2d 929 (1984) (Rosellini, J., concurring), *cert. denied*, ___ U.S. ___, 85 L. Ed. 2d 526, 105 S. Ct. 2169 (1985):

> At four specific points, the statutory scheme narrows the class of persons subject to the death penalty: first, on the basis of specific elements of aggravated murder; second, with the prosecutor's decision to seek the death penalty for lack of mitigating circumstances; third, with the jury's consideration of mitigating circumstances; and fourth, with this court's ultimate review of the prior proceedings. This compares favorably with the Georgia plan upheld in *Zant v. Stephens*, [462 U.S. 862, 77 L. Ed. 2d 235, 103 S. Ct. 2733 (1983)].

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[69] *State v. Campbell*, 103 Wn.2d 1, 40, 691 P.2d 929 (1984) (Rosellini, J., concurring), (citing *Zant v. Stephens*, 462 U.S. 862, 77 L. Ed. 2d 235, 251, 103 S. Ct. 2733 (1983)), *cert. denied*, ___ U.S. ___, 85 L. Ed. 2d 526, 105 S. Ct. 2169 (1985).

[70] *Woodson v. North Carolina*, 428 U.S. 280, 303, 49 L. Ed. 2d 944, 96 S. Ct. 2978 (1976). *See Gregg v. Georgia*, 428 U.S. 153, 189, 49 L. Ed. 2d 859, 96 S. Ct. 2909, *reh'g denied*, 429 U.S. 875, 50 L. Ed. 2d 158, 97 S. Ct. 197 (1976).

As required by the United States Supreme Court, Washington's aggravated first degree murder statutes thus allow particularized consideration of relevant aspects of the character and record of individuals to be considered before imposition of the death penalty. Thus, it is obvious that every defendant who commits the same type of crime, or indeed the same crime, will not necessarily be given the same penalty. This does not necessarily mean that the difference is based on prejudice or disproportionality; it simply means that if there are demonstrable differences shown in the character and record of the defendants, the penalties may not be disproportionate considering "*the defendant*".

As the United States Supreme Court expressed it:

> Any capital sentencing scheme may occasionally produce aberrational outcomes. Such inconsistencies are a far cry from the major systemic defects identified in Furman [*Furman v. Georgia*, 408 U.S. 238, 33 L. Ed. 2d 346, 92 S. Ct. 2726 (1972)]. As we have acknowledged in the past, "there can be 'no perfect procedure for deciding in which cases governmental authority should be used to impose death.'" *Zant v. Stephens*, [462 U.S. 862, 884, 77 L. Ed. 2d 235, 103 S. Ct. 2733 (1983)], quoting *Lockett v. Ohio*, 438 U. S. 586, 605[, 57 L. Ed. 2d 973, 98 S. Ct. 2954 (1978)].

Pulley v. Harris, 465 U.S. 37, 54, 79 L. Ed. 2d 29, 104 S. Ct. 871 (1984). And as that court also said in *Gregg v. Georgia*, 428 U.S. 153, 199, 49 L. Ed. 2d 859, 96 S. Ct. 2909, *reh'g denied*, 429 U.S. 875, 50 L. Ed. 2d 158, 97 S. Ct. 197 (1976):

> Nothing in any of our cases suggests that the decision to afford an individual defendant mercy violates the constitution.

In the case before us, the imposition of capital punishment on the defendant Mak, although it was not imposed on his confederate, Benjamin Ng, was not an "aberrational outcome". The evidence of mitigation and the defendants' respective roles in the crime were different. In Ng's case, the jury heard three medical/psychiatric experts testify that Ng suffered from dementia as the result of a childhood head injury aggravated by a later beating.[71] On the other hand, the jury in the defendant Mak's case had evidence before it from which it could reasonably conclude that there were no mitigating circumstances meriting leniency except perhaps for his youth (apparently he was 22 at the time); that it was the defendant Mak who for years had planned to rob a gambling club and eliminate the witnesses; that it was the defendant Mak who tried to recruit others to assist in the crime; that, as the sole survivor testified, it was the defendant Mak who, with a gun in his hand, stood above the victims like a leader issuing orders; and, in short, that

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[71] A statutory mitigating factor relied on by Ng was RCW 10.95.070(6): "Whether, at the time of the murder, the capacity of the defendant to appreciate the wrongfulness of his or her conduct or to conform his or her conduct to the requirements of law was substantially impaired as a result of mental disease or defect;" See *State v. Benjamin Ng*, Report of the Trial Judge, at 6.

it was the defendant Mak who planned, supervised and helped carry out the robbery and murders.

Significantly, the jury in the defendant Mak's case was not unaware of the outcome of Benjamin Ng's case. The jury in the Mak case heard testimony concerning Benjamin Ng's mandatory life sentence, and also heard testimony about a prior murder committed by Ng (which the jury in Ng's case did not hear because of evidentiary bars laid down by this court in prior death penalty cases).[72] Despite that, and despite the fact that the jury heard testimony from which it could conclude that Benjamin Ng was the principal triggerman (or, arguably, the sole triggerman), it returned a special verdict that in the defendant Mak's case, there were not sufficient mitigating circumstances to merit leniency.

In sum, nothing suggests that the death penalty was arbitrarily or capriciously imposed against the defendant Mak,[73] or that it was excessive or disproportionate considering both the crime and the defendant.

ISSUE SIXTEEN. Did a deputy prosecuting attorney, in closing argument at the penalty phase of the trial, violate the

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[72] *See Bartholomew* I, 98 Wn.2d at 197; *State v. Bartholomew*, 101 Wn.2d 631, 638-39, 683 P.2d 1079 (1984) (*Bartholomew* II).

[73] *See generally Campbell*, at 30, 41.

defendant's constitutional right to a fair and impartial trial, due process of law and privilege against self-incrimination?

CONCLUSION. Nothing in the record before us suggests that the deputy prosecutor's closing argument during the penalty phase of the trial inappropriately affected the jury's verdict.

In closing argument, the prosecuting attorney has a wide latitude in drawing and expressing reasonable inferences from the evidence.[74] A prosecutor arguing to a jury may not, of course, interject his or her personal beliefs into the case, but certainly may comment on the credibility of witnesses.[75] Any statements as to the law in closing argument are to be confined to the law set forth in the instructions.[76] So far as improper argument is concerned, it is the defendant who bears the burden of establishing not only the impropriety of the prosecutor's remarks, but also their prejudicial effect. The issue is then whether there is a substantial likelihood that the alleged misconduct affected the jury's verdict thereby depriving the

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[74] *State v. Harvey*, 34 Wn. App. 737, 739, 664 P.2d 1281 (1983).

[75] *State v. Knapp*, 14 Wn. App. 101, 110-11, 540 P.2d 898 (1975); *State v. Walton*, 5 Wn. App. 150, 151-52, 486 P.2d 1118 (1971).

[76] *State v. Davenport*, 100 Wn.2d 757, 760-61, 675 P.2d 1213 (1984).

defendant of a fair trial.[77] Moreover, the resolution of this issue is within the sound discretion of the trial court.[78]

The record shows that the deputy prosecutor's argument to the jury at the penalty phase of the case was well within the bounds of judicial advocacy. In his opening statement, the deputy prosecutor outlined his role and how it differed from that which he had at the guilt phase of the trial. Then during closing argument, the deputy prosecutor summarized. We have carefully perused the closing arguments. The deputy prosecutor did not misinform the jury on the burden of proof as the defendant now claims.[79] When read in the context of the argument, contrary to defendant's assertions on appeal, the deputy prosecutor did not personally vouch for the credibility of witnesses, assert his personal opinion on the death penalty, appeal to the jury's passion and sympathy for the victims and their families, or mislead the jury as to the law.

Specifically, defendant argues that "[t]he prosecutor's statements and argument to the jury constitute improper comment on [the defendant's] failure to testify. . ." When read in context,

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[77] *Harvey*, at 740.

[78] *Harvey*, at 740.

[79] *See Davenport*, at 760-61.

this is not so. In the penalty phase of the trial, the court's instructions to the jury included the following:

> The evidence you are to consider consists of testimony of the witnesses and the exhibits admitted into evidence, in phase one of this trial and during this special sentencing proceeding.[80]

The defendant testified at the guilt phase of the trial, and at some length, and that testimony was, therefore, before the jury at the penalty phase. As defense counsel argued at the penalty phase "Mr. Mak got on the stand, he told you about his background." The jury at the penalty phase was thus fully entitled to consider the defendant's testimony at the guilt phase of the trial in mitigation of his act; similarly, the deputy prosecutor was entitled to argue that the evidence was insufficient to merit leniency. Indeed, that was the issue.

Defendant has shown no improper comments in the deputy prosecutor's closing argument or any prejudice resulting therefrom.[81]

ISSUE SEVENTEEN. Was the defendant denied his right to allocution afforded by former CrR 7.1(a) at the penalty phase of the trial?

CONCLUSION. The right of allocution was not denied.

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[80]Court's instruction 1 (sentencing phase).

[81]*See Harvey*, at 740.

At the time this case was tried, CrR 7.1 (a) read in pertinent part:

> Sentence shall be imposed or an order deferring sentence shall be entered without unreasonable delay. Pending such action the court may release or commit the defendant, pursuant to CrR 3.2. Before disposition the court shall afford counsel an opportunity to speak and shall ask the defendant if he wishes to make a statement in his own behalf and to present any information in mitigation of punishment.

The rule has since been amended.[82] The provisions of that former rule were mandatory, and the trial court was required to give the defendant an opportunity to speak "immediately prior to the imposition of sentence".[83] Under this rule as it was at the time of trial, a defendant had the right: (1) to make a statement in his or her own behalf; and (2) to present any information in mitigation of punishment.[84]

The capital punishment statutes, in turn, provide as follows:

> At the special sentencing proceeding both the prosecution and defense shall be allowed to make an opening statement. The prosecution shall first present evidence and then the defense may present evidence. Rebuttal evidence may be presented by each side. Upon conclusion of the evidence, the court shall

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[82]The amendments to former rule CrR 7.1 were effective July 1, 1984. *See* Washington Court Rules 1985, CrR 7.1, CrR 7.2 and comments thereto.

[83]*State v. Happy*, 94 Wn.2d 791, 792, 620 P.2d 97 (1980).

[84]*Happy*, at 793.

> instruct the jury and then the prosecution and defense shall be permitted to present argument. The prosecution shall open and conclude the argument.

RCW 10.95.060(2).

During the penalty phase of the trial, the trial court ruled that the defendant could personally make an unsworn statement to the jury prior to closing arguments to the jury. Then later, at the time the trial court actually pronounced sentence, the trial court also invited the defendant to speak on his own behalf. On both occasions the defendant declined to speak.

From the colloquy between the trial court and both counsel, it appears that what the defendant was apparently seeking was the right, at the end of the penalty phase of the trial, to present evidence on the issue before the jury which would be uncross-examined, unsworn, unrebuttable and unanswerable by argument. Nothing in the statute[85] contemplates or permits that, nor does our former allocution rule.[86] The defendant was given his right to speak to the jury at the sentencing hearing without being required to take an oath, and was again given the right to speak to the trial court before sentence was actually imposed. There was no denial of the defendant's right to allocution.

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[85]RCW 10.95.060(2).

[86]Former CrR 7.1(a). See footnote 82.

ISSUE EIGHTEEN. Did the trial court err in allowing a deputy prosecuting attorney to make an opening statement to the jury at the penalty phase of the trial?

CONCLUSION. The trial court followed the statute (RCW 10.95.060(2)) when it allowed both the prosecution and the defense to make opening statements at the outset of the penalty phase of the case. This was completely proper.

The defendant assigns error to the trial court's ruling permitting the prosecution to make an opening statement at the penalty phase of the trial. The trial court made no "ruling" as such. Since a statute specifically prescribes that "[a]t the special sentencing proceeding both the prosecution and defense shall be allowed to make an opening statement",[87] the trial court simply permitted counsel to do so. At the trial no objection to this was voiced.

As this court recently held in *State v. Campbell*, 103 Wn.2d 1, 15-16, 691 P.2d 929 (1984), *cert. denied*, ___ U.S. ___, 85 L. Ed. 2d 526, 105 S. Ct. 2169 (1985), also a capital case, "[a] prosecutor's opening statement should be confined to a brief statement of the issues of the case, an outline of the anticipated material evidence, and reasonable inferences to be drawn therefrom." The deputy prosecuting attorney's short

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[87]RCW 10.95.060(2) (part).

penalty phase opening statement conformed to this admonition. There was no error in this regard.

The defendant argues, in effect, that when the State informed the court it did not plan to present additional evidence at the penalty phase of the trial this somehow changed these principles. This is incorrect. As discussed above, the special sentencing statutes provide that the same jury which hears the guilt phase of the case will also hear the penalty phase unless jury trial is waived or unless unforeseen circumstances necessitate the impaneling of a new jury.[88] Further, if a new jury must for some reason be impaneled, both parties may then introduce evidence concerning the facts and circumstances of the murder before the new jury.[89] These statutes thus contemplate that evidence from the guilt phase of the case will be considered at the penalty phase.[90] The State had a right to proceed as it did. Neither party was obligated to present additional evidence unless that party desired to do so. The State did not present

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[88]RCW 10.95.050(3).

[89]RCW 10.95.060(3).

[90]*State v. Campbell*, 103 Wn.2d 1, 39, 691 P.2d 929 (1984) (Rosellini, J., concurring), *cert. denied*, ___ U.S. ___, 85 L. Ed. 2d 526, 105 S. Ct. 2169 (1985). *Accord, State v. Bartholomew*, 101 Wn.2d 631, 643, 683 P.2d 1079 (1984) (*Bartholomew* II).

evidence at the penalty phase, and the defendant did. That was fully appropriate.

ISSUE NINETEEN. Did the defendant receive effective assistance of counsel during the penalty phase of the trial?

CONCLUSION. Considering the entire record, the defendant was afforded effective assistance of counsel throughout the trial.

The test for whether a criminal defendant was denied effective assistance of counsel is if, after considering the entire record, it can be said that the accused was afforded effective representation and a fair and impartial trial.[91] Under this standard the defendant is not guaranteed successful assistance of counsel.[92] To establish ineffective assistance of counsel, defendant bears the burden of proving two things: First, considering the entire record, that he or she was denied effective representation, and second, that he or she was prejudiced by such ineffectiveness.[93] If defense counsel's trial conduct can be characterized as legitimate trial strategy or tactics, then it cannot

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[91]*State v. Thomas*, 71 Wn.2d 470, 471, 429 P.2d 231 1967); *State v. Bradbury*, 38 Wn. App. 367, 370, 685 P.2d 623 (1984).

[92]State v. Adams, 91 Wn.2d 86, 90 586 P.2d 1168 (1978); *State v. White*, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972).

[93]*State v. Jury*, 19 Wn. App. 256, 262-63, 576 P.2d 1302 (1978). *See Strickland v. Washington*, ___ U.S. ___, 80 L. Ed. 2d 674, 693, 104 S. Ct. 2052 (1984).

serve an a basis for a claim that the defendant did not receive effective assistance of counsel.[94]

In the case before us, the defendant alleges numerous instances which he now claims amount to the denial of effective assistance of counsel. He claims that trial counsel was ineffective because: (1) counsel failed to take exception to the trial court's penalty phase instruction relating to the State's burden of proof (see Issue 26); (2) counsel failed to object to the trial court not giving an instruction on the presumption of mitigation and failed to propose such an instruction (see Issue 27); (3) counsel failed to object to the trial court not instructing the jury that it was not to consider the fact that the defendant did not testify at the special sentencing proceeding and failed to propose such an instruction (see Issue 28); and (4) counsel failed to propose an instruction stating that it is appropriate for the jury to consider sympathy in determining whether the defendant should receive the death sentence (see Issue 24).

We have carefully reviewed these claims. Considering the trial court's instructions as a whole, as we must, we conclude that they properly informed the jury of the law and that they also

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[94] *Adams*, at 90.

permitted the defendant to fully argue his theory of the case.[95] The defendant has failed to meet the first prong of his burden of proof -- that he was denied effective representation.[96]

Continuing with the defendant's claims in this regard he contends that (5) he did not receive effective representation because trial counsel failed to request dismissal of the death penalty notice after learning that the State was not going to present further evidence at the penalty phase of the case. For the reasons stated in our discussion of the previous issue (Issue 18), the State had the right to proceed as it did, therefore, this claim is nonmeritorious.

The defendant further argues (6) that trial counsel failed to present to the jury that the defendant was a poorly educated immigrant. Contrary to defendant's present assertion, the record shows that at the guilt phase of the trial defense counsel did present such testimony, and that the jury was instructed at the penalty phase that it could consider it.[97] Furthermore, defense counsel did argue this point to the jury in his closing argument

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[95]*See State v. Jeffries*, 105 Wn.2d 398, ___ P.2d ___ (1986); *State v. Johnson*, 29 Wn. App. 807, 811-12, 631 P.2d 413 (1981).

[96]*Jury*, at 262-63.

[97]Court's instruction 1 (sentencing phase).

at the close of the special sentencing proceeding, one such example being as follows:

> [DEFENSE COUNSEL:] Mr. Mak got on the stand, he told you about his background. Doesn't sound good. It is a black mark on all of us. A young immigrant came to this country, couldn't speak English very well, never got assimilated . . .

Finally, defendant contends that (7) trial defense counsel failed to request "a substantial recess" between the guilt and penalty phases of the trial. This, in turn, he argues, resulted in an unfair disposition. We do not agree.

The guilt phase of the case concluded with the return of a guilty verdict during the noon hour. The trial court asked counsel if it was agreeable to begin the sentencing phase of the case at 3 p.m. Both counsel said it was. Nothing in the record suggests that both counsel were not ready by that time or that defense counsel was not as fully prepared then as he would have been later. Furthermore, defendant's present argument in this regard disregards the statutory admonition that the special sentencing proceeding

> *shall commence as soon as practicable* after completion of the trial at which the defendant's guilt was determined.

(Italics ours.) RCW 10.95.050(3) (part).

The defendant has failed to meet his burden of showing that trial defense counsel made errors that deprived the defendant

of effective assistance of counsel which, in turn, deprived him of a fair trial – let alone that he was prejudiced thereby.[98]

ISSUE TWENTY. Did the trial court commit reversible error by failing, at the guilt phase of the trial, to instruct the jury as to the requirement of jury unanimity?

CONCLUSION. Through neglect or error on the part of the court or staff, the final paragraph was inadvertently omitted from the concluding instruction. This did not result in instructional error, however, because other instructions adequately covered the matter of jury unanimity. Furthermore, any question on the matter was conclusively dispelled by the polling of the jury.

Defendant alleges, and the State concedes, that the omission of the last page of the concluding instruction to the jury (Instruction 15), in the filed set of Court's Instructions to the Jury (guilt phase), was a result of neglect or error on the part of the trial court.

The State argues, nonetheless, that the trial court personally read the final page of the concluding instruction to the jury from its own set of instructions and that "[i]t is difficult to imagine that nobody would have detected such a glaring omission in a stock instruction which is given at the close of

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[98] *See State v. Thomas, supra; State v. Jury, supra.*

every case." It is clear that no exception was taken to the giving of this instruction. The defendant, on the other hand, argues that this error requires reversal because the final page was the one containing the instruction on unanimity in the verdict.

The State had proposed that a concluding instruction be given at the guilt phase of the trial, the final paragraph of which read as follows:[99]

> *Since this is a criminal case, all twelve of you must agree for you to return a verdict.* When all of you have so agreed, fill in the proper form of verdict to express your decision. The foreman will sign it and notify the bailiff who will conduct you into court to declare your verdict.

(Italics ours.) The defendant did not propose a concluding instruction. The instruction proposed by the State was the pattern Basic Concluding Instruction[100] modified to fit this kind of case. Such an instruction, or its equivalent, is indeed "stock" instructional language given in jury trials of criminal cases.

The problem is that the final paragraph of the proposed concluding instruction is missing from the trial court's guilt phase instructions contained in the clerk's papers. This missing final paragraph is the one containing the above italicized language. The trial court's reading of the instructions to the jury

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[99]State's proposed instruction 13 (guilt phase).

[100]WPIC 155.01.

from the bench is not contained in the verbatim report of proceedings, presumably because the court reporter did not report it. In short, based on the appellate record presented to us by the parties, it is not possible to determine if the missing final paragraph was or was not actually read to the jury by the trial court. That being so, and because the trial judge signed the guilt phase instructions at the bottom of the 1-page conclusion instruction, we must assume that the above quoted final paragraph of the concluding instruction was not read to the jury or otherwise given to it.

The law of this state is settled: "[i]n Washington, a defendant may be convicted only when a unanimous jury concludes that the criminal act charged in the information has been committed." (Italics ours.)[101] A careful reading of the other instructions that were given show that they sufficiently instructed the jury on this point. By the aggravated murder in the first degree "to convict" instruction, the jury was specifically instructed:[102]

> In other words, *you must all agree* which, if any, of these elements has been proved beyond a reasonable doubt.

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[101] *State v. Petrich*, 101 Wn.2d 566, 569, 683 P.2d 173 (1984).

[102] Court's instruction 7, (guilt phase (part)). The full text of instruction 7 is set out in connection with our discussion of Issue 21.

(Italics ours.) This sufficiently instructed the jurors as to their duty to unanimously agree on the guilt phase general and special verdicts. Furthermore, the jury was additionally instructed with reference to the guilt phase special verdict as follows:[103]

> If you find the defendant guilty of aggravated first degree murder, indicate on the special verdict form which of the aggravating circumstances that you have unanimously found to exist beyond a reasonable doubt.

Nor is that the end of our inquiry on this issue. On point is this court's decision in *State v. Mickens*, 61 Wn.2d 83, 377 P.2d 240 (1962). There, the instruction stating the requirement of a unanimous verdict was also omitted. It, too, was a criminal case involving a single defendant. The court affirmed the conviction, however, holding that

> since the jury was polled, there is no doubt that the verdict was unanimous and was the result of each juror's individual determination.

Mickens, at 87. Here, too, a minute entry in the journal establishes that when the jury returned its general and special verdicts to the court, the verdicts were read aloud in their entirety. Then, immediately following such reading, the individual jurors were polled in open court. Each juror affirmed that each of the verdicts was his or her individual verdict and the verdict of the jury. That minute entry on the polling reads:

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[103]Court's instruction 15 (guilt phase (part)).

> By direction of the Court the jury is polled. Twelve jurors answer these are their individual verdicts and the verdicts of the jury. The verdicts are filed and the jury is retired to the jury room.

The polling of the jury was reported, transcribed and also made a part of the record herein. It fully verifies the minute entry. "The polling of the jury is for the purpose of determining that the verdict signed by the foreman is that of the individual jurors . . ."[104] It is our holding here that the polling of the jury established that the omission from the concluding instruction did not affect the final outcome of the case, thus was no more than harmless error in any event.[105]

State v. Badda, 63 Wn.2d 176, 385 P.2d 859 (1963), cited by the defendant, does not hold contrary to *Mickens*; indeed, it cites and quotes *Mickens* with approval. *Badda* simply holds that under the facts of that case, *which involved two defendants*, the court could not conclude from the record that there was a "total concurrence of all jurors".

For the reasons set forth above, we have no doubt that in this case all 12 jurors concurred on both the general and special verdicts returned at the conclusion of the guilt phase of the case.

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[104] *State v. Agtuca*, 12 Wn. App. 402, 406, 529 P.2d 1159 (1974).

[105] *State v. Mickens*, 61 Wn.2d 83, 87, 377 P.2d 240 (1962). *See State v. Wanrow*, 88 Wn.2d 221, 237, 559 P.2d 548 (1977).

ISSUE TWENTY-ONE. Did the trial court err in the guilt phase of the case by submitting a single special verdict form to the jury on the "aggravating circumstances" issue for all 13 counts of aggravated murder in the first degree?

CONCLUSION. As discussed under Issue 20, two instructions informed the jury that the jurors had to be unanimous as to the presence of any aggravating circumstance with respect to each of the 13 counts. The trial court did not abuse its discretion by submitting one special verdict form for all 13 counts.

At the close of the guilt phase of the case, the trial court submitted to the jury only one special verdict form on aggravating circumstances for all 13 counts of aggravated murder in the first degree. It was not excepted to. That verdict form, with the jury's responses thereto, is as follows:

> We, the jury, find that the State has proved beyond a reasonable doubt that the following aggravated circumstance(s) exist as to counts I through XIII:
>
> yes (yes or no) (a) The defendant and his accomplices committed the murder to conceal the commission of a crime or to protect or conceal the identity of any person committing a crime;
>
> no (yes or no) (b) There was more than one victim and the murders were part of a common scheme or plan of the defendant;
>
> yes (yes or no) (c) The murder was committed in the course of or furtherance of a robbery.

The defendant claims that since this special verdict form did not provide a separate special finding on each count, it is impossible to determine whether the jury decided that either one or both of the aggravating circumstances found were proved in each of the counts. Thus, he argues, the jury's special verdict does not show that its decision was unanimous on the aggravating factors as to all 13 counts.

As this court recently held in *State v. Bartholomew*, 98 Wn.2d 173, 192 n.2, 654 P.2d 1170 (1982), *State's cert. granted*, 463 U.S. 1203, 77 L. Ed. 2d 1383, 103 S. Ct. 3530, *defendant's cert. denied*, 463 U.S. 1212, 77 L. Ed. 2d 1395, 103 S. Ct. 3548 (1983) (*Bartholomew* I),

> in order that a death sentence be rationally reviewable it must at least be possible for a reviewing court to determine which of the 10 statutory aggravating factors were found proved beyond a reasonable doubt. *If more than one aggravating factor is put before the jury, . . . the jury must be requested to specify which aggravating factors it found proved beyond a reasonable doubt.*

(Italics ours.)

At the guilt phase of the trial, the trial court gave instruction 5, listing the name of the victim alleged in each count. Then it gave the following "to convict" instruction setting out the elements of the offense:[106]

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[106]Court's instruction 7 (guilt phase).

Instruction No. 7

To convict the defendant Kwan Fai Mak of the crime of aggravated murder in the first degree, *as charged in any count*, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 19th day of February, 1983, the defendant or an accomplice caused the death of the individual named;

(2) That the defendant acted with the intent to cause the death;

(3) That the defendant acted with premeditated intent to cause the death;

(4) That the death was a result of the acts of the defendant or his accomplice;

(5) That one or more of the following aggravating factors was present:

(a) The defendant and his accomplice committed the murder to conceal the commission of a crime or to protect or conceal the identity of any person committing a crime, OR

(b) There was more than one victim and the murders were part of a common scheme or plan of the defendant, OR

(c) The murder was committed in the course of or in furtherance of the crime of robbery;

(6) That the acts occurred in King County, Washington.

If you find from the evidence that elements (1), (2), (3), (4), (6), and either (5)(a), (5)(b), or (5)(c) have been proved beyond a reasonable doubt as to any count, then it will be your duty to return a verdict of guilty as to that count. Elements (5)(a), (5)(b) and (5)(c) are alternatives and only one need be proved. *You must, however, agree unanimously that (5)(a) has been proved, or that (5)(b) has been proved, or that (5)(c) has been proved. In other words, you must all agree which, if any, of these elements has been proved beyond a reasonable doubt.*

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty as to the charge of aggravated first degree murder as to that count.

(Italics ours.)

Our reading of this instruction establishes that the jury was informed that the jurors had to be unanimous as to the presence of the aggravating factors found in connection with each of the 13 counts. As discussed under Issue 20, the concluding instruction (instruction 15) also told them this. The special verdict form, when completed by the jury, indicated which of the aggravating circumstances the jury unanimously found in reaching its verdict of guilty on all counts. This met the requirement of *Bartholomew* I. We also observe that at the trial of the case no issue was raised, or evidence presented, to indicate other than that the aggravating circumstances alleged were the same with respect to one and all of the victims. We perceive no error in this regard.

ISSUE TWENTY-TWO. Did the trial court err by instructing the jury that the defendant could be convicted of aggravated murder in the first degree based on an accomplice theory?

CONCLUSION. The trial court did not err in its accomplice instructions. It did instruct on accomplice principles in connection with the aggravated murder in the first degree elements that constitute premeditated first degree murder, and that was proper. In that part of the aggravated murder in the first degree instructions pertaining to the aggravating factors, however, the trial court's instructions did not allow the

defendant's sentence to be enhanced on the basis of accomplice principles.

In the interest of clarity, we again quote that part of the"to convict" instruction which sets out the elements of the crime of aggravated murder in the first degree, this time, however, with the accomplice portions thereof italicized:[107]

Instruction No. 7

> To convict the defendant Kwan Fai Mak of the crime of aggravated murder in the first degree, as charged in any count, each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or about the 19th day of February, 1983, the defendant *or an accomplice* caused the death of the individual named;
>
> (2) That the defendant acted with the intent to cause the death;
>
> (3) That the defendant acted with premeditated intent to cause the death;
>
> (4) That the death was a result of the acts of the defendant *or his accomplice;*
>
> (5) That one or more of the following aggravating factors was present:
>
> (a) The defendant *and his accomplice* committed the murder to conceal the commission of a crime or to protect or conceal the identity of any person committing a crime, OR
>
> (b) There was more than one victim and the murders were part of a common scheme or plan of the defendant, OR
>
> (c) The murder was committed in the course of or in furtherance of the crime of robbery;
>
> (6) That the acts occurred in King County, Washington.

(Italics ours.) By special verdict, the jury found the existence of two of the three aggravating factors alleged in this case, namely,

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[107]Court's instruction 7 (guilt phase).

those specified in paragraphs 5(a) and 5(c) of the above instruction.

As we recently observed in *State v. Kincaid*, 103 Wn.2d 304, 312, 692 P.2d 823 (1985), "[c]onceptually, the crime is premeditated murder in the first degree with aggravating circumstances. Commonly, however, the crime is often referred to by the courts and others as "aggravated first degree murder'." We then continued on to explain:

> A statutory aggravating circumstance relates to the crime of premeditated murder in the first degree as a defendant being armed with a deadly weapon relates to the commission of certain felonies while so armed. In the statutory framework in which the statutory aggravating circumstances now exist, they are not elements of a crime but are "aggravation of penalty" provisions which provide for an increased penalty where the circumstances of the crime aggravate the gravity of the offense. The crime for which the defendant was tried and convicted in connection with the death of his wife was premeditated murder in the first degree, and the jury was correctly instructed as to the elements of that offense. The penalty for that murder was properly enhanced to life imprisonment without possibility of parole when the jury unanimously found by a special verdict that the existence of a statutory aggravating circumstance had been proved by the State beyond a reasonable doubt.

(Footnotes omitted.) *Kincaid*, at 312.

Thus, the first four elements of the aggravated murder in the first degree "to convict" instruction, set forth above, state the elements of the substantive crime of premeditated murder in the first degree. Then the fifth element sets out the alleged "aggravation of penalty" provisions which, when one or more is

found, increase the penalty to mandatory life, or death, depending on the determination made in the capital sentencing phase of the case where, as here, the prosecutor has sought the death penalty. The death penalty had not been sought in *Kincaid*. In *Kincaid*, a separate instruction on the alleged aggravating factors was given by the trial court, whereas here, as can be seen from the above instruction, the trial court included the aggravating factors as an element of the offense (element 5). That was not appropriate for, as we also pointed out in *Kincaid*:

> *Nor is it our intention to hold herein that referring to this crime in instructions as the crime of "aggravated murder in the first degree", and including any alleged aggravating circumstance as an element of the offense, would be error.* While the manner in which the trial court structured its instructions to the jury in this case may conceptually be the preferred manner, it is not the only way that a jury may be properly instructed on the matter.

(Italics ours.) *Kincaid*, at 313.

In the present case, the trial court also gave the following instruction on accomplice (complicity) liability:[108]

> Instruction No. 10
>
> A person who is an accomplice in the commission of a crime is guilty of that crime.
>
> A person is an accomplice in the commission of a crime, if, with knowledge that it will promote or facilitate the commission of the crime, he either:

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[108]Court's instruction 10 (guilt phase).

> (1) solicits, commands, encourages, or requests another person to commit the crime; or
> (2) aids or agrees to aid another person in planning or committing the crime.
> The word "aid" means all assistance whether given by words, acts, encouragement, support or presence. Mere presence and knowledge of the criminal activity of another are not enough to establish that a person is an accomplice and has the necessary intent for the crime charged. A person who is present at the scene and is ready to assist by his presence is aiding in the commission of the crime.[109]

This instruction was not excepted to.

What the defendant seems to be arguing here, based on principles of statutory construction and accomplice liability, is as follows: the only way the defendant could be convicted of aggravated murder in the first degree (for which the death penalty may be imposed) is if the State proved beyond a reasonable doubt: (1) that the defendant was in fact the shooter (and the prosecutor concedes that the evidence in this regard is conflicting); or (2) that as an accomplice to Benjamin Ng (who clearly did at least some of the shooting), the defendant knew Benjamin Ng was armed and shared Benjamin Ng's intent to commit the crime and his purpose in committing the aggravating factors when they went into the Wah Mee Club together (and which intent and purpose the defendant by his testimony denied). Defendant Mak further argues that the above instructions to the

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[109] *See* WPIC 10.51.

jury did not so require, and that his convictions, therefore, should be reversed.

The legal syllogism on which this argument is predicated seems to be basically as follows:

(a) The accomplice (complicity) statute found in the Washington Criminal Code (RCW 9A.08.020(l)) relates only to "crimes" contained in that Code. *State v. McKim*, 98 Wn.2d 111, 653 P.2d 1040 (1982). *See State v. Davis*, 101 Wn.2d 654, 682 P.2d 883 (1984).

(b) The statutory aggravating factors which were used in this case to enhance premeditated murder in the first degree to aggravated murder in the first degree are not "crimes" in the Washington Criminal Code, RCW Title 9A, but are sentence enhancement factors contained in RCW Title 10. *Kincaid*, at 312-13.

(c) The trial court's instructions 7 and 10, quoted above, allowed the jury to enhance the defendant's sentence toaggravated murder on an accomplice liability theory.

(d) Therefore, as this syllogism goes, it must follow that this was reversible error inasmuch as the jury was not instructed that the defendant had to be found to have shared Benjamin Ng's intent to commit the crimes and his purpose in committing the gravating factors before he could be convicted. *See State v. McKim, supra*.

As previously discussed, paragraphs 1 through 4 of instruction 7, above, set out the elements of premeditated murder in the first degree.[110] Thus the State was required to prove that the defendant acted with the intent to cause each victim's death and that his intent was premeditated. These first four paragraphs also required the State to prove that "the defendant *or* an accomplice" (italics ours) caused the deaths. This is in accord with the accomplice principles stated in instruction 10, above, and with the established accomplice law of this state. RCW 9A.08.020; *State v. Davis, supra*. Premeditated murder in the first degree is a statute found in the Washington Criminal Code, RCW 9A.32.030(l)(a), and the complicity statute is, therefore, expressly applicable to that crime, RCW 9A.04.090. Furthermore, exception was not taken to instruction 7.

Turning to paragraph 5 of instruction 7, above, which specifies the alleged aggravating circumstances that serve as "sentence enhancement factors" with reference to the punishment, it will be seen that the only reference to "accomplice" contained in that paragraph is to the requirement that the jury find "the defendant *and* his accomplice" (italics ours) committed the murder to conceal the commission of the crime or to protect their identities. If this paragraph had

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[110]RCW 9A.32.030(1)(a); *see* WPIC 26.02.

referred to "the defendant *or* his accomplice," we would be required to deal with the rest of the defendant's theory, but since it does not, we need not address it. Since the jury had to find that "the defendant *and* his accomplice" committed the murder to conceal the crime or their identities, the finding of this aggravating factor was *not* predicated on accomplice liability. This issue does not arise at all in connection with the other aggravating factor found by the jury, *i.e.*, murder committed during the course of a robbery, since the word "accomplice" was not used in that part of the instruction (instruction 7, para. 5(c)).

Thus, we are not required in this case to address situations such as that presented in *Enmund v. Florida*, 458 U.S. 782, 73 L. Ed. 2d 1140, 102 S. Ct. 3368 (1982), but note of *Enmund* is required to illustrate the distinction we draw here. In *Enmund* a death sentence was reversed on the basis of the Eighth Amendment and the Fourteenth Amendment because the death sentence was based on the defendant's conviction of felony murder. In that case, *Enmund* was the getaway car driver for two robbers. He sat in the parked car outside a house awaiting their return. They killed two victims during the course of the robbery. The killings were not planned and *Enmund* did not personally participate in any way and there was no finding he intended to kill. In the State of Washington, felony murder (although it is murder in the first degree) cannot be the predicate

upon which a charge of aggravated murder in the first degree is based; the only proper predicate is premeditated murder in the first degree. *Kincaid*, at 307; *Enmund*, at 789 n.6. Further, as discussed above, the jury by its guilty verdict in this case found that the defendant Mak did have a premeditated intent to kill.

ISSUE TWENTY-THREE. Did the trial court err at the guilt phase of the case by not instructing the jury on the "lesser included offense" of premeditated murder in the first degree?

CONCLUSION. A trial court does not commit error by not giving an included offense instruction that was never requested by the defendant, and which would have conflicted with the defendant's theory of the case had it been given.

The defendant assigns error to the trial court's failure to instruct the jury on the lesser included offense of premeditated first degree murder as defined by RCW 9A.32.030(l)(a). This was not error because not only was no such instruction requested by the defendant,[111] but had the trial court given such an instruction sua sponte, it would have been in direct conflict with the defendant's theory of the case.

It was the defendant's theory at trial that, while he had no intent to kill, he did go to the Wah Mee Club on the night of the crime, was armed with a gun at the time and did take

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[111] *State v. Dowell*, 26 Wn. App. 629, 631, 613 P.2d 197 (1980); *State v. Walker*, 13 Wn. App. 545, 550, 536 P.2d 657 (1975).

personal property from a person by force or fear -- and that after he left the premises, one or both of his two companions (Benjamin Ng and Tony Ng) killed the victims. Defense counsel clearly so stated in his opening statement at the guilt phase of the case; the defendant so testified; and defense counsel so argued to the jury at the conclusion of the guilt phase of the case.

The trial court gave the following instruction explaining "included offense":[112]

> No. 6.
>
> If you are not satisfied beyond a reasonable doubt that the defendant is guilty of the crime charged, the defendant may be found guilty of any lesser crime, the commission of which is necessarily included in the crime charged, if the evidence is sufficient to establish the defendant's guilty of such lesser crime beyond a reasonable doubt.
>
> *The crime of aggravated murder in the first degree necessarily includes the lesser crime of murder in the first degree.*
>
> When a crime has been proven against a person and there exists a reasonable doubt as to which of two or more degrees that person is guilty, he shall be convicted only of the lowest degree.

(Italics ours.) The italicized portion of this instruction is identical to language from a similar instruction on the subject proposed by the defendant.

The foregoing instruction was followed by the aggravated murder in the first degree "to convict" instruction (instruction 7)

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[112]Court's instruction 6 (guilt phase). This is WPIC 4.11.

which was, in turn, followed by this felony murder "to convict" instruction:[113]

> No. 8.
>
> To convict the defendant Kwan Fai Mak of the crime of murder in the first degree, as charged in any count, each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or about the 19th day of February, 1983, the individual named was killed;
>
> (2) That the defendant was committing robbery in the first degree;
>
> (3) That the defendant or another participant caused the death in the course of and in furtherance of such crime or in immediate flight from such crime;
>
> (4) That the deceased was not a participant in the crime; and
>
> (5) That the acts which caused the death of the decedent occurred in King County, Washington.
>
> If you find from the evidence that each of these elements has been proved beyond a reasonable doubt as to any count, then it will be your duty to return a verdict of guilty as to that count.
>
> On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements as to any count, then it will be your duty to return a verdict of not guilty as to that count.

No exception was taken to the instructions just quoted.

The defendant now argues that it was reversible error not to have given an instruction on the "lesser included offense" of premeditated murder in the first degree.[114] He cites *State v. Workman*, 90 Wn.2d 443, 584 P.2d 382 (1978) and *State v.*

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[113]Court's instruction 8 (guilt phase). This is WPIC 26.04.

[114]RCW 9A.32.030(1)(a).

that it is prejudicial error to not give a lesser included offense instruction when there is evidence to support it. Even assuming that, however, it still did not constitute reversible error for the trial court not to give an instruction on an included offense that (a) was never requested and (b) did not accord with the defendant's theory of the case put forth at the trial by counsel based on the defendant's own testimony. In both *Workman* and *Parker*, the lesser included offense instruction in question was requested; here it was not.

In his closing argument at the quilt phase, trial counsel for the defendant argued that "the facts clearly indicate felony murder with regard to Mr. Mak." And further:

> Even though he did not have any part in taking the money, even though he himself did not take the guns from the two people, he still was there when the guns were taken, he took the personal property, theft from another, his accomplice used force, he's guilty of robbery, a murder resulted, people got shot, he's guilty of murder in the first degree. But he's not guilty of aggravated murder. He had no intent, no premeditated intent to cause the death.

The deputy prosecutor argued just the opposite:

> This was not a first degree murder, this was an aggravated first degree murder or it's nothing.

The defendant testified clearly and unequivocally that he had committed felony murder. His lawyer argued with equal clarity and unequivocation that the defendant had committed

felony murder; this was by way of an attempt to save the defendant from paying for his crimes with the death penalty. Neither felony murder nor premeditated first degree murder are capital offenses in this state -- nor are they punishable by mandatory life imprisonment.[115] Thus, the defendant's conviction of either premeditated first degree murder or felony murder would have had the same effect, avoidance of the death penalty and preservation of the possibility of parole.

Under these circumstances, we hold that: (1) the lesser included offense instruction that was given, not having been excepted to at trial, became the law of the case;[116] (2) any error in connection therewith was invited error and cannot be complained of on appeal;[117] and (3) any error in that connection was harmless beyond a reasonable doubt.[118] If error at all, it clearly was not reversible error.

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[115]*See Kincaid*, at 310.

[116]*State v. Louie*, 68 Wn.2d 304, 312, 413 P.2d 7 (1966), *cert. denied*, 386 U.S. 1042, 18 L. Ed. 2d 610, 87 S. Ct. 1501 (1967); *State v. Byrd*, 25 Wn. App. 282, 287, 607 P.2d 321 (1980).

[117]*State v. Pam*, 101 Wn.2d 507, 511, 680 P.2d 762 (1984); *State v. Kincaid*, 103 Wn.2d 304, 314-15, 692 P.2d 823 (1985).

[118]*State v. Burri*, 87 Wn.2d 175, 182, 550 P.2d 507 (1976). *See Chapman v. California*, 386 U.S. 18, 24, 17 L. Ed. 2d 705, 87 S. Ct. 824, 24 A.L.R.3d 1065, *reh'g denied*, 386 U.S. 987, 18 L. Ed. 2d 241, 87 S. Ct. 1283 (1967); *State v. Johnson*, 71 Wn.2d 239, 244-45, 427 P.2d 705 (1967).

The defendant also argues that since felony murder requires proof that the crime was committed "in the course of *and* in furtherance of" the felony,[119] it was not properly an "included offense" of aggravated first degree murder at all, thus, the trial court also erred on this basis when it gave the felony murder included offense instruction. Even accepting defendant's present premise that it was error to give the felony murder included offense instruction, for each and all of the same three reasons just stated, it was not reversible error.

ISSUES TWENTY-FOUR through THIRTY-THREE. The defendant presents a broad array of further penalty phase instructions which he now feels should have been given, and instructions that were given but which he now feels should not have been given, thus raising the question whether any of these, or all of them together, amount to reversible error?

CONCLUSION. None of the instructions defendant now argues should have been given were proposed at trial as they must have been to preserve any claimed error, and no exceptions were taken to those instructions which were given as is necessary to preserve any claimed error as to them. This being a capital case, and since some of the arguments allege constitutional error,

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[119] *See* RCW 9A.32.030(1)(c).

we have nonetheless reviewed these claims.[120] We have evaluated them considering the totality of the circumstances, including the instructions given to the jury, the arguments of counsel, the weight of the evidence and other relevant factors. We conclude therefrom that the defendant did receive a constitutionally fair trial[121] and that there is no reversible error with respect to these assignments of error, whether considered individually or collectively.

It is necessary to an understanding of the numerous and sometimes intricately argued issues raised in this connection, that the full text of the instructions given to the jury at the close of the penalty phase of the case be set out. These were as follows:

> It is your duty to determine the facts in this case from the evidence produced in court. It also is your duty to accept the law from the court, regardless of what you personally believe the law is or ought to be. You are to apply the law to the facts and in this way decide the case.
>
> The order in which these instructions are given has no significance as to their relative importance. The attorneys may properly discuss any specific instructions they think are particularly significant. You should consider the instructions as a whole and should not place undue emphasis on any particular instruction or part thereof.
>
> The evidence you are to consider consists of the testimony of the witnesses and the exhibits admitted into evidence, in phase one of

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[120] *See State v. Griffith*, 52 Wn.2d 721, 732, 328 P.2d 897 (1958); RAP 2.5.

[121] *See In re Lile*, 100 Wn.2d 224, 228, 668 P.2d 581 (1983); *Kentucky v. Whorton*, 441 U.S. 786, 789, 60 L. Ed. 2d 640, 99 S. Ct. 2088, *reh'g denied*, 444 U.S. 887, 62 L. Ed. 2d 121, 100 S. Ct. 186 (1979).

this trial and during this special sentencing hearing. It has been my duty to rule on the admissibility of evidence. You must not concern yourselves with the reasons for these rulings. You will disregard any evidence which either was not admitted or which was stricken by the court.

> In determining whether any proposition has been proved, you should consider all of the evidence introduced by all parties bearing on the question. Every party is entitled to the benefit of the evidence whether produced by that party or by another party.
>
> You are the sole judges of the credibility of the witnesses and of what weight is to be given the testimony of each. In considering the testimony of any witness you make [sic] take into account the opportunity and ability of the witness to observe, the witness' memory and manner while testifying, any interest, bias or prejudice the witness may have, the reasonableness of the testimony of the witness considered in light of all the evidence, and any other factors that bear on believability and weight.
>
> Counsel's remarks, statements and arguments are intended to help you understand the evidence and apply the law. They are not evidence, however, and you should disregard any remark, statement or argument which is not supported by the evidence or the law as given to you by the court.
>
> The lawyers have the right and the duty to make any objections which they deem appropriate. Such objections should not influence you, and you should make no presumption because of objections by counsel.
>
> The law does not permit me to comment on the evidence in any way and I have not intentionally done so. If it appears to you that I have so commented, during either the trial or the giving of these instructions, you must disregard such comment entirely.

Court's instruction 1 (penalty phase).

> Jurors should consult with one another and deliberate with a view to reaching a unanimous verdict, if it can be done without violence to individual judgment. Each of you must decide the case for yourself but only after an impartial consideration of the evidence with your fellow jurors. In the course of deliberations, you should not hesitate to re-examine your own views and change your

opinion if you are convinced it is erroneous. However, you should not surrender your honest conviction as to the weight or effect of the evidence solely because of the opinions of your fellow jurors, or for the mere purpose of returning a verdict.

Court's instruction 2 (penalty phase).

> The question you are required to answer is as follows:
>
> Having in mind the crime of which the defendant has been found guilty, are you convinced beyond a reasonable doubt that there are not sufficient mitigating circumstances to merit leniency?
>
> If you unanimously answer "yes," the sentence will be death. If you unanimously answer "no," or if you are unable to agree on a unanimous answer, the sentence will be life imprisonment without possibility of parole.
>
> In deciding the question posed, the jury may consider any relevant factors, including but not limited to the following:
>
> (1) Whether the age of the defendant at the time of the crime calls for leniency;
>
> (2) Whether the defendant was an accomplice to a murder committed by another person where the defendant's participation in the murder was relatively minor;
>
> (3) Whether the defendant acted under duress or domination of another person.
>
> Life imprisonment without the possibility of release or parole means that: (1) the individual shall not have his sentence suspended, deferred, or commuted by any judicial officer; (2) the Board of Prison Terms and Paroles or its successor shall never parole the individual or reduce the period of confinement; (3) the person shall not be released as a result of any type of good time calculation; (4) nor shall the Department of Corrections permit the person to participate in any release or furlough program.

Court's instruction 3 (penalty phase).

> During this special sentencing proceeding, the State has the burden of convincing you beyond a reasonable doubt that there are not sufficient mitigating circumstances

to merit leniency and that the death penalty should therefore be imposed.

A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly and carefully considering all of the evidence or lack of evidence. If, after such consideration, you have an abiding belief that there are not sufficient mitigating circumstances to merit leniency, you are satisfied beyond a reasonable doubt.

Court's instruction 4 (penalty phase).

A mitigating circumstance is a fact about either the offense or about the defendant which in fairness or in mercy may be considered as extenuating or reducing the degree of moral culpability or which justifies a sentence of less than death, although it does not justify or excuse the offense.

The appropriateness of the exercise of mercy is itself a mitigating factor you may consider in determining whether the State has proved beyond a reasonable doubt that the death penalty is warranted.

You are also to consider as mitigating circumstances any other factors concerning the defendant that you find to be relevant.

Court's instruction 5 (penalty phase).

Because you have found the defendant Kwan Fai Mak guilty of aggravated murder, you have been reconvened for this special sentencing proceeding.

It is the foreman's duty to see that discussion is carried on in a sensible and orderly fashion, that the issues submitted for your decision are fully and fairly discussed and that every juror has a chance to be heard and to participate in the deliberations upon each question before the jury.

You will be furnished with all of the exhibits admitted in evidence, these instructions and sentencing verdict form.

You must answer one question. All twelve of you must agree before you answer a question "yes" or "no". When all of you have agreed, fill in the answer to the question in the verdict form to express your decision. When

you have filled in the answer called for by the verdict form, the foreman will sign it and notify the bailiff who will conduct you into court to declare your verdict.

You will now listen to the argument of counsel.

/s/ Frank D. Howard
JUDGE

Court's instruction 6 (penalty phase).

Following is the special verdict returned by the jury following its deliberations at the conclusion of the penalty phase:

AS TO COUNTS I-XIII

Having in mind the crime of which the defendant has been found guilty, are you convinced beyond a reasonable doubt that there are not sufficient mitigating circumstances to merit leniency?

ANSWER:

[X] "YES" (In which case the defendant shall be sentenced to death)

[ ] "NO" (In which case the defendant shall be sentenced to life imprisonment without possibility of parole)

[ ] "UNABLE TO UNANIMOUSLY AGREE"
(In which case the defendant shall be sentenced to life imprisonment without possibility of parole)

/s/ [foreman's name]
FOREPERSON

To the extent reasonably possible, we have summarized our decision on each of these claims of instructional error. These are as follows.

Lack of an instruction on "sympathy". (Issue 24).[122] At the outset of the penalty phase, the trial court made it clear

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[122] *See State v. Quinlivan*, 81 Wn.2d 124, 130, 499 P.2d 1268, 72 A.L.R.3d 835 (1972).

to the jury that this was a separate sentencing proceeding. Instruction 5 gave the jury the right to consider "mercy" as well as any other factors it might find relevant. "Mercy" and "sympathy" are both defined in terms of "compassion".[123] The defense had full leeway to argue sympathy and did so.

Lack of an instruction that the death penalty should not be imposed solely to exact retribution or in a spirit of vengeance. (Issue 25). *Hawkins v. Rhay*, 78 Wn.2d 389, 401, 474 P.2d 557 (1970), requiring such an instruction at the retrial of the defendant in that particular case, was decided before the death penalty statutes were enacted in their present form, where there is a separate penalty proceeding and wherein the entire focus of the proceeding is on whether or not there are sufficient mitigating circumstances to merit leniency. Defendant's argument to the contrary notwithstanding, the State did not in this case argue in a spirit of vengeance or seek the death penalty solely to exact retribution.[124] Such complained of statements

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[123] *Webster's Third New International Dictionary* 1413, 2317 (1968).

[124] We observe that in *Enmund v. Florida*, 458 U.S. 782, 798, 73 L. Ed. 2d 1140, 102 S. Ct. 3368 (1982), the United States [Supreme Court states:

> In *Gregg v. Georgia* [428 U.S. 153, 49 L. Ed. 2d 859, 96 S. Ct. 2909 (1976),] the opinion announcing the judgment observed that '[t]he death penalty is said to serve two principal social purposes: retribution and deterrence of capital crimes by prospective offenders.' 428 U.S., at 183 (footnote omitted)."]

as "the proper punishment for this crime, for this man is the punishment provided by law for this crime, and that is the penalty of death" were not improper argument. Considering the crimes committed, they were mild statements indeed.

The use in instruction 4 of "convincing you" instead of "proving to you". (Issue 26). RCW 10.95.060(4) provides:

> Upon conclusion of the evidence and argument at the special sentencing proceeding, the jury shall retire to deliberate upon the following question: "Having in mind the crime of which the defendant has been found guilty, are you *convinced* beyond a reasonable doubt that there are not sufficient mitigating circumstances to merit leniency?"
>
> In order to return an affirmative answer to the question posed by this subsection, the jury must so find unanimously.

(Italics ours.) The trial court instructed the jury in accordance therewith in its instructions 3 and 4, as well as in the special verdict (which was in the form proposed by the defendant). None of these was excepted to. While expressing the State's burden in terms of "proving" rather than "convincing" is preferable, instructing in the language of a statute is also usually proper.[125] Instructing in the language of the statute was not error in the situation here presented.

Lack of an instruction that sufficient mitigating circumstances to merit leniency are presumed. (Issue 27).

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[125] *See State v. Price*, 33 Wn. App. 472, 474, 655 P.2d 1191 (1982); *State v. Levage*, 23 Wn. App. 33, 35, 594 P.2d 949 (1979).

Instruction 4 contains the "beyond a reasonable doubt" standard and specifically provides that the State has the burden on the [ ] issue before the jury. The language of the special verdict then itself underscores the State's burden in this regard.

The defendant's argument on this issue proceeds along the following lines: the omission of a presumption of innocence instruction in a criminal case is a constitutional error which requires reversal (citing *State v. McHenry*, 88 Wn.2d 211, 213-14, 558 P.2d 188 (1977)); the presumption he advocates in this case (*i.e.*, that there are sufficient mitigating circumstances to merit leniency) is likewise constitutionally required; that even though the defendant at trial proposed no instruction on this sufficient mitigating circumstances presumption (and took no exception to instruction 4 on that or any other basis), this being a constitutional error, this court is nonetheless compelled to consider it (RAP 2.5) and should on this basis reverse the defendant's conviction.

The flaw in the defendant's argument is that there is no constitutional right to a presumption of sufficient mitigating circumstances to merit leniency. The presumption of innocence, on the other hand, lies at the very foundation of the administration of our criminal law; its antecedents have been traced from Deuteronomy, through Roman law, English common

law and the common law of the United States.[126] There is simply no equivalent ancient antecedent or similar constitutionally required presumption with respect to "sufficient mitigating circumstances to merit leniency" for a person who has already been convicted of aggravated murder in the first degree. Thus, there is no reviewable claim of error in this regard.

Lack of an instruction stating that the fact the defendant did not testify in the special sentencing proceeding is not to be used against him. (Issue 28). Had such an instruction been requested, it presumably would have been given. Here, however, it was unnecessary in any event. This is because the defendant's testimony was actually before the jury since the defendant had testified at the guilt phase, and by instruction 1 that testimony was before the jury for its consideration in the penalty phase.

Whether there was a failure to instruct the jury, during the penalty phase, as to the consequences of its decision (as required by RCW 10.95.060(1)). (Issue 29). There was no such failure. At the outset of the penalty phase, the trial court specifically informed the jury that "[t]he sentence will be either life imprisonment without the possibility of parole, or the death

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[126] *Coffin v. United States*, 156 U.S. 432, 453-54, 39 L. Ed. 481, 15 S. Ct. 394 (1895).

penalty." The penalty phase special verdict also made this entirely clear.

Whether that part of instruction 1, which informed the jury it could consider the testimony and evidence admitted at the guilt phase, was improper and an unconstitutional comment on the evidence (Const. art. 4, § 16). (Issue 30). As discussed in connection with Issue 14, this part of the instruction was proper. Similarly, it was not a comment on the evidence because it did not convey to the jury the personal attitudes of the judge toward the merits of the cause.[127]

Whether the instructions improperly compelled the jury to reach unanimity. (Issue 31). They did not. The instructions, particularly when read together with the last paragraph of the special verdict, gave the jury the option to not unanimously agree to any answer to the statutory question (RCW 10.95.060(4)) before the jury.

Whether the relevant factors the jury could consider in deciding the statutory question at issue (see instruction 3, para. 3) should have included all eight "relevant factors" listed in the statute (RCW 10.95.070), rather than just the three that it did. (Issue 32). This is the converse of the question as it has usually been presented with respect to that statute (*i.e.*, the

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[127]*State v. Foster*, 91 Wn.2d 466, 481, 589 P.2d 789 (1979); *State v. Johnson*, 29 Wn. App. 807, 810-11, 631 P.2d 413 (1981).

listing of all eight statutory "relevant factors" in the instruction imparted prejudicial error into the case).[128] The eight factors contained in RCW 10.95.070 merely provide a guide to the nature and function of mitigating circumstances; they serve as illustrations of the factors the jury might wish to consider in determining if there are sufficient mitigating circumstances to merit leniency.[129] The colloquy between court and counsel at the time the penalty phase jury instructions were settled shows that the trial court gave defense counsel the option of having any of the statutory mitigating factors included in instruction 3 that he chose. As previously discussed, the mitigating circumstances instruction, instruction 5, also gave defense counsel a broad range within which to argue. There was no error.[130]

Whether a single special verdict form was appropriate at the penalty phase. (Issue 33). Defendant's argument on this point is much the same as it was with respect to the special verdict in the guilt phase; our answer is also much the same.[131] The jury was instructed at the penalty phase that it had to

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[128]*State v. Rupe*, 101 Wn.2d 664, 701, 663 P.2d 571 (1984); *State v. Campbell*, 103 Wn.2d 1, 28, 691 P.2d 929 (1984), *cert. denied*, ___ U.S. ___, 85 L. Ed. 2d 526, 105 S. Ct. 2169 (1985).

[129]*Campbell*, at 28.

[130]*State v. Jeffries*, 105 Wn.2d 398, 420, ___ P.2d ___ (1986).

[131]See Issue 21.

unanimously agree on the answer to the question in issue,[132] and the verdict contained a place to so specify in the event the jury could not unanimously agree. There was no inappropriate requirement of unanimity. Furthermore, there was no issue in either phase of the trial as to there being any difference in either the crime or the defendant's situation with respect to any one victim as compared with any other victim. This was not error.[133]

ISSUES THIRTY-FOUR through FORTY-NINE. The defendant concludes his assignments of error with a listing of what he considers to be 14 fatal defects in Washington's capital punishment statutes plus two other claims in what he terms "supplemental assignments of error".

CONCLUSION. We conclude that these 16 final assignments of error are without merit.

The claimed defects in the capital punishment statutes raise the following 14 issues. Issue 34: Does RCW 10.95.040 violate the separation of powers doctrine? Issue 35: Should the defendant have been charged by grand jury indictment instead of by information? Issue 36: Did the combined effect of RCW 10.95.040 and not obtaining a grand jury indictment exacerbate

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[132]Court's instruction 6 (penalty phase).

[133]*See Jeffries*, at 419-20.

the claimed violation of the separation of powers doctrine? Issue 37: Does RCW 10.95.040 violate the equal protection clauses of the federal and state constitutions? Issue 38: Is RCW 10.95 unconstitutionally void for vagueness? Issue 39: Does RCW 10.95 constitute an unlawful delegation of legislative authority to the executive branch of government? Issue 40: Does RCW 10.95 promote unequal administration of law in violation of the Fourteenth Amendment? Issue 41: Do the capital punishment statutes constitute, in effect, a mandatory death penalty statute in violation of the Eighth Amendment and article 1, section 14 of this state's constitution?

We continue our listing of the issues raised by the statutory defects the defendant claims are contained in the capital punishment statutes. Issue 42: Is RCW 10.95.060(4) unconstitutional because it shifts the burden of proof on the death penalty issue to the defendant? Issue 43: Because the statutes do not require jury articulation of which mitigating circumstances were found and how they were weighed, do they deny the defendant's right to appellate review? Issue 44: Is RCW 10.95.130(2)(b) a legislative encroachment upon an exclusively judicial function, hence a violation of the separation of powers doctrine? Issue 45: Does RCW 10.95.120 deny a defendant the right to rebut information given to the trial judge? Issue 46: Is RCW 10.95.020 unconstitutional because it does not genuinely

narrow the class of persons eligible for the death penalty? And, Issue 47: Is RCW 10.95 unconstitutional because the death penalty constitutes cruel and unusual punishment?

The issues raised by what the defendant terms "supplemental assignments of error" are two. Issue 48: Was it error to exclude for cause all jurors who held absolute scruples against the death penalty? Issue 49: Did the jury, by finding two aggravating factors, violate defendant's double jeopardy rights by imposing multiple punishments for the same act? The foregoing issues have been answered in the negative in this opinion, or in our recent opinions in the following cases: *State v. Jeffries*, 105 Wn.2d 398, ___ P.2d ___ (1986); *State v. Bartholomew*, 104 Wn.2d 844, 710 P.2d 196 (1985) (*Bartholomew* III); *State v. Benjamin Ng*, 104 Wn.2d 763, 713 P.2d 63 (1985); *State v. Kincaid*, 103 Wn.2d 304, 692 P.2d 823 (1985); *State v. Campbell*, 103 Wn.2d 1, 691 P.2d 929 (1984), *cert. denied*, ___ U.S. ___, 85 L. Ed. 2d 526, 105 S. Ct. 2169 (1985); *State v. Dictado*, 102 Wn.2d 277, 687 P.2d 172 (1984); *State v. Rupe*, 101 Wn.2d 664, 683 P.2d 571 (1984); *State v. Bartholomew*, 101 Wn.2d 631, 683 P.2d 1079 (1984) (*Bartholomew* II); *State v. Bartholomew*, 98 Wn.2d 173, 654 P.2d 1170 (1982), *State's cert. granted*, 463 U.S. 1203, 77 L. Ed. 2d 1383, 103 S. Ct. 3530, *defendant's cert. denied*, 463 U.S. 1212, 77 L. Ed. 2d 1395, 103 S. Ct. 3548 (1983)

(*Bartholomew* I). No useful purpose would be served by again plowing this same ground, therefore, we decline to do so.

ISSUES FIFTY through FIFTY TWO. These three issues are those specifically posed by the Legislature for this court to answer in our appellate review of all death sentences. The statute so requiring states the questions for us to determine as follows:

> (a) Whether there was sufficient evidence to justify the affirmative finding to the question posed by RCW 10.95.060(4); and
> (b) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. For the purposes of this subsection, "similar cases" means cases reported in the Washington Reports or Washington Appellate Reports since January 1, 1965, in which the judge or jury considered the imposition of capital punishment regardless of whether it was imposed or executed, and cases in which reports have been filed with the supreme court under RCW 10.95.120; and
> (c) Whether the sentence of death was brought about through passion or prejudice.

RCW 10.95.130(2)(a)-(c) (part).

Sufficiency of the evidence. (Issue 50). The question the jury was required to answer was, of course, this: "[h]aving in mind the crime of which the defendant has been found guilty, are you convinced beyond a reasonable doubt that there are not sufficient mitigating circumstances to merit leniency?"[134] At the

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[134]RCW 10.95.060(4).

penalty phase, the jury returned a unanimous special verdict answering this question "yes".

We perform the first aspect of our sufficiency of the evidence review function by using the analysis that, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found sufficient evidence to justify this affirmative finding beyond a reasonable doubt. This is the *Jackson v. Virginia*, 443 U.S. 307, 319, 61 L. Ed. 2d 560, 99 S. Ct. 2781 (1979), test for sufficiency of the evidence (adopted by this state in *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980)) and which we here apply to the first question posed by the statute.[135]

Viewing the evidence concerning the facts of the crime according to this test, the crime of which the defendant was found guilty was the intentional premeditated murder of 13 people, during the course of a robbery and for cover up purposes. The mitigating factors the defendant claimed were: (1) his age – he was in his early twenties; (2) that he was an accomplice to a murder committed by another person where his participation in the murder was minor; and (3) he acted under

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[135] *See Justus v. State*, 247 Ga. 276, 280, 276 S.E.2d 242, *cert. denied*, 454 U.S. 882, 70 L. Ed. 2d 193, 102 S. Ct. 366, *reh'g denied*, 454 U.S. 1093, 70 L. Ed. 2d 633, 102 S. Ct. 661 (1981); *McClesky v. State*, 245 Ga. 108, 115, 263 S.E.2d 146, *cert. denied*, 449 U.S. 891, 66 L. Ed. 2d 119, 101 S. Ct. 253 (1980).

duress or domination of another person.[136] The jury by its verdict showed that it likely did not believe either the second or the third mitigating factors. The defendant was armed, but whether the jury decided he was a "triggerman" or not is unknown. Even if he was not a "triggerman", however, that is not determinative where, as here, the evidence is overwhelming that he is the one who planned, supervised and helped carry out the killings in order to conceal his identity and that of his confederates.

We conclude here, as the court concluded in *Campbell*, 103 Wn.2d at 29, that "we too find it difficult to find sufficient mitigating circumstances to merit leniency. Thus we conclude there was sufficient evidence to justify the jury's affirmative finding."

Was the defendant's sentence of death excessive or disproportionate to the penalty imposed in similar cases, considering the crime and the defendant? (Issue 51). For the reasons discussed at length under Issue 15, we answer this question "no".

Whether the sentence of death was brought about through passion or prejudice? (Issue 52). In this connection, the defendant in his brief reiterates various of his allegations of error

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[136]See Court's instruction 3 (penalty phase).

previously raised and separately discussed above. No valid purpose would be served by reiterating our decisions on these matters here; suffice to say, they do not constitute a showing that the sentence of death was brought about through passion or prejudice. No other competent evidence was presented showing that the death sentence in this case came about through passion or prejudice. We further note that the defendant did not at any time seek a change of venue from King County, either before or after the very extensive voir dire examination of jurors, thus at least suggesting that the defendant felt he could receive a fair trial in King County.

To sum up. We have conducted a detailed review of the lengthy record of this trial, and have read and reread the voluminous briefs filed herein. We are satisfied that none of the assignments of error is well taken and that none of the issues raised shows reversible error. The defendant was fairly tried, convicted on all counts and sentenced to pay the supreme penalty prescribed by the laws of this sovereign state.

Affirmed.

/s/
ANDERSEN, J.

WE CONCUR:

/s/ _____

/s/ _____

/s/ _____

_____

_____

/s/

/s/

/s/

/s/

Majority by Andersen, J.
Dissent by Utter, J.

No. 49966-7

UTTER, J. (dissenting)--I disagree with the majority's disposition of appellant Mak's claims concerning admission of certain evidence during both the guilt and sentencing phases of the trial which connected a third party to the crimes at the Wah Mee Club. My more fundamental concerns with the constitutional objections to the death penalty statute have already been discussed, *see State v. Campbell*, 103 Wn.2d 1, 41, 691 P.2d 929 (1984) (Utter, J., concurring in part; dissenting in part). These address many of the other issues raised by the defendant and I refer the court to them.

There would seem to be little that could be said that might convince a jury that one who participated in the killing of 13 people should have his life spared. And yet, under the bizarre facts of this case, two of the three participants in this crime have been spared the death penalty. One, Tony Ng, because he escaped to Canada, could not be charged with a capital offense and be successfully extradited to the United States. The other participant, who fired most of the shots, did not receive the death penalty. Only one actor in this most brutal

of all killings committed within this state, received the death penalty. The appellant here was characterized by the State as the planner, the one who orchestrated the whole event, and on this basis the State argued as one of its two distinct grounds, that he deserved the death penalty when the other two participants in this crime did not.

The defendant attempted to introduce evidence from which he could argue someone else in fact orchestrated the crime and, in particular, that Benjamin Ng's role, as the one firing most of the shots, was more central than the prosecution had maintained. To fail to allow this evidence before the jury is something I cannot reconcile with either our statutory procedures or constitutional due process. The evidence should have been admitted in at least the penalty phase of the trial under RCW 10.95.060. It also was properly offered in the guilt phase of the trial and admissible under ER 401.

I

The rule for the admission of mitigating evidence at the sentencing phase of capital cases was stated in *Lockett v. Ohio*, 438 U.S. 586, 57 L. Ed. 2d 973, 98 S. Ct. 2954 (1978):

> the Eighth and Fourteenth Amendments require that the sentencer . . . not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.

(Footnote omitted.) 438 U.S. at 604 (cited with approval in *State v. Bartholomew*, 101 Wn.2d 631, 645-46, 683 P.2d 1079 (1984) (*Bartholomew* II). This rule recognizes that corrective mechanisms are not available in capital cases. 438 U.S. at 605. *See also Eddings v. Oklahoma*, 455 U.S. 104, 71 L. Ed. 2d 1, 102 S. Ct. 869 (1982).

In the present case, of course, the relevant Washington statute permits the defendant to present any relevant evidence, regardless of its admissibility under the rules of evidence. RCW 10.95.060. *See also State v. Bartholomew*, 101 Wn.2d at 642; *State v. Rupe*, 101 Wn.2d 664, 701, 683 P.2d 571 (1984). Despite this, in sentencing appellant, the trial judge refused to allow the jury to consider evidence that, if taken as true, may well have influenced the jury to impose a lesser sentence. The majority only concludes, without discussion, that this evidence was neither relevant nor probative.

Washington Evidence Rule 401 defines "relevant evidence" as follows:

> . . . evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

See also Black's Law Dictionary 1160 (5th rev. ed. 1979). Furthermore, this court has declared the test of relevancy to be "whether the evidence has a '"tendency to make the existence"

of the fact to be proved "more probable or less probable than it would be without the evidence'." *State v. Renfro*, 96 Wn.2d 902, 906, 639 P.2d 737 (1982), *cert. denied*, 459 U.S. 842, 74 L. Ed. 2d 86, 103 S. Ct. 94 (1983). In *State v. Rupe, supra* at 686-89, we concluded that evidence that tended to increase the probability of defendant's guilt was relevant. Likewise, evidence that tends to decrease the probability of a defendant's guilt is relevant.

The majority's classification of the proffered evidence as neither relevant nor probative is not warranted. Appellant Mak's offer of proof consisted of the following evidence: (1) a third party planned to control gambling in the International District; (2) the third party contacted Benjamin Ng on the day of the Wah Mee killings; (3) the party was a "banker" for an International District gambling club that had just closed down; (4) an informant told the police that this person directed young gang members; (5) Benjamin Ng's car had been seen at the person's restaurant an hour before the crime; and (6) the person offered to sell Benjamin Ng a bulletproof vest a week before the Wah Mee incident.

Without this evidence, the jury was unaware of a possible third party connection, a connection about which appellant Mak claims he was ignorant. Because the evidence, if

believed, tended to decrease appellant Mak's guilt, it was relevant under the definition outlined in *Renfro* and ER 401.

However, even if the evidence was not admissible under the definition outlined in ER 401, that definition is not controlling. RCW 10.95.060. Less restrictive standards for relevance and probative value are applied to evidence of mitigating circumstances at the sentencing phase of trial. *State v. Bartholomew*, 101 Wn.2d at 631, 683 P.2d at 1079 (1984) (*Bartholomew* II). This is because "when a jury is faced with the question whether or not the defendant should be put to death, the defendant should be allowed to submit *any* evidence of . . . 'the circumstances of the offense . . . '." (Italics mine.) 101 Wn.2d at 646 (citing *Lockett v. Ohio*, 438 U.S. at 604). Evidence of the involvement of a third party is clearly relevant to the jury's decision to sentence Mak and directly relevant to answer the State's claim that the defendant alone in this case deserved to die. *See Blankenship v. State*, 251 Ga. 621, 308 S.E.2d 369 (1983).

Where, as here, appellant has presented evidence regarding the involvement of a third party, such evidence should be received during the sentencing phase of the trial. Such evidence assures that the appellant is judged as an individual. *See Lockett v. Ohio, supra*. Since, under ER 401 and RCW 10.95.060 the evidence was relevant, the trial court erred in

refusing to receive this evidence during the sentencing phase of trial.

II

Additionally, the majority concludes that the statement by the third party to Benjamin Ng, which would have established the necessary foundation for appellant Mak's offer of proof, is hearsay. Although hearsay, the statement was admissible under ER 804(b)(3).

ER 804(b)(3) provides:

> (b) Hearsay Exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
>
> (3) Statement Against Interest. A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability, or to render invalid a claim by him against another, that a reasonable man in his position would not have made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

Although the offer to sell a bulletproof vest to Benjamin Ng one week before the Wah Mee murders is not a direct statement against the third party's interest, that fact is not controlling. The statement "need not have been a clear and unequivocal admission of criminal conduct." *State v. Parris*, 98 Wn.2d 140, 149, 654 P.2d 77 (1982). All that is required is that the declaration would tend to subject him to criminal

liability. *United States v. Barrett*, 539 F.2d 244 (1st Cir. 1976) (cited with approval in *State v. Parris, supra*).

In *Barrett*, the defendant offered witness testimony which tended to exculpate him as a participant in the theft and sale of a stamp collection. The Court of Appeals for the First Circuit held that the remarks tended to subject the declarant, Tilley, to criminal liability because they strongly implied his participation in the stamp crimes. *Barrett*, at 251.

Other jurisdictions have also followed the rule that a declaration against interest is not confined to "clear confessions." In *United States v. Alvarez*, 584 F.2d 694 (5th Cir. 1978), the court held that statements made for the purpose of setting up a drug transaction were against declarant's penal interest. *See also United States v. Bagley*, 537 F.2d 1[illegible] (9th Cir. 1976) and *United States v. Benveniste*, 564 F.2d 335 (9th Cir. 1977).

Here, declarant offered to sell a bulletproof vest to Benjamin Ng. Although this statement does not clearly and unequivocally amount to an admission of criminal conduct, it does imply that the declarant was involved in the Wah Mee murders. Thus, the statement was made in furtherance of a criminal act and qualifies as an admission against penal interest within the holding set by *Barrett* and cited with approval in *Parris*.

The statement also satisfies the other two prerequisites ofER 804(b)(3). First, the declarant must be unavailable despite good faith efforts to locate him. *State v. Valladares*, 99 Wn.2d 663, 668, 664 P.2d 508 (1983). In this case, appellant offered to call the declarant as a witness himself, but was refused. Thus, appellant made a good faith effort to avail the declarant to the court within the prerequisites of ER 804(b)(3).

Secondly, the statement was accompanied by corroborating circumstances indicating its trustworthiness. *Valladares*, 99 Wn.2d at 668. Among other factors in evaluating the trustworthiness of extrajudicial statements, consideration should be given to the close proximity of the declaration to the crime, whether the statements were spontaneous and against declarant's penal interest, and whether there was apparent reason for declarant to lie. *State v. Dictado*, 102 Wn.2d 277, 288, 687 P.2d 172 (1984) (citing *State v. Boast*, 87 Wn.2d 447, 553 P.2d 1322 (1976)).

Here, the statement was made only one week before the murders. Secondly, as discussed above, the statement was against the declarant's penal interest, and finally, the statement was inculpatory rather than exculpatory, implicating only the declarant. Thus, it was not in declarant's interest to lie. *See State v. Parris*, 98 Wn.2d 140, 154, 654 P.2d 77 (1982) (Williams, J., dissenting).

Because I believe that the statement should have been admitted, I further conclude that appellant's offer of proof satisfied the test stated in *State v. Downs*, 168 Wash. 664, 667, 13 P.2d 1 (1932) (majority, at 26). The trial court erred in refusing the appellant's offer of proof.

III

The trial court's refusal to admit the evidence raises, in turn, a proportionality issue, which the majority does not discuss. For the same crimes, Benjamin Ng received a life sentence, while appellant Mak must die. The State justifies this result on two grounds: (1) Mak is characterized as the one who orchestrated the crime, Ng's role being similar only in that he also participated in the crime. Respondent's Brief, at 88; (2) Personal differences between Ng and Mak justify the different results.

My quarrel is with the first of these two bases. Had the contested evidence been admitted, it could have raised doubts about Mak's alleged autonomy and control in the crime. Because the issue of Mak's control was so central to the penalty proceedings, the evidence of a third party's involvement in the crime was relevant both to the issue of control and the issue of premeditation. The jury itself should have been allowed to weigh that evidence in determining whether Mak should die while his accomplices live. This seems especially true when the

State has conceded that it believes Ng, not Mak, killed most of the victims. Respondent's Brief, at 15, 88. Presented with evidence rebutting Mak's control, as well as State concessions that Ng fired most of the shots, a jury might well have been reluctant to sentence Mak to death, knowing that Ng would be spared. Neither we, nor Mak, will ever know. Mak, however, has less time to speculate about the possibility.

As I have indicated elsewhere, *see Campbell*, 103 Wn.2d at 41 (Utter, J., concurring and dissenting), I do not believe that our death penalty statute meets constitutional standards. Nevertheless, even conceding that issue, I would hold, for the above reasons, that the trial court erred in refusing to admit the evidence and would remand so that the jury might consider *all* relevant evidence before it decided that Mak should die while his coconspirators live.

/s/_____

I concur, /s/_____

[FILED]
[OCTOBER 5, 1983]

APPENDIX G

IN THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

NO. 83-1-00504-0

STATE OF WASHINGTON,

Plaintiff,

vs.

KWAN FAI MAK,

Defendant.

COURT'S INSTRUCTIONS TO THE JURY
SENTENCING PHASE

DEPT. 24

October 5, 1983

/s/
FRANK D. HOWARD, JUDGE

NO. 1

It is your duty to determine the facts in this case from the evidence produced in court. It is also your duty to accept the law from the court, regardless of what you personally believe the law is or ought to be. You are to apply the law to the facts and in this way decide the case.

The order in which these instructions are given has no significance as to their relative importance. The attorneys may properly discuss any specific instructions they think are particularly significant. You should consider the instructions as a whole and should not place undue emphasis on any particular instruction or part thereof.

The evidence you are to consider consists of the testimony of the witnesses and the exhibits admitted into evidence, in phase one of this trial and during this special sentencing hearing. It has been my duty to rule on the admissibility of evidence. You must not concern yourselves with the reasons for these rulings. You will disregard any evidence which either was not admitted or which was stricken by the court.

In determining whether any proposition has been proved, you should consider all of the evidence introduced by all parties bearing on the question. Every party is entitled to the benefit of the evidence whether produced by that party or by another party.

You are the sole judges of the credibility of the witnesses and of what weight is to be given the testimony of each. In considering the testimony of any witness you make take into account the opportunity and ability of the witness to observe, the witness' memory and manner while testifying, any interest, bias or prejudice the witness may have, the reasonableness of the testimony of the witness considered in light of all the evidence, and any other factors that bear on believability and weight.

Counsel's remarks, statements and arguments are intended to help you understand the evidence and apply the law. They are not evidence, however, and you should disregard any remark, statement or argument which is not supported by the evidence or the law as given to you by this court.

The lawyers have the right and the duty to make any objections which they deem appropriate. Such objections should not influence you, and you should make no presumption because of objections by counsel.

The law does not permit me to comment on the evidence in any way and I have not intentionally done so. If it appears to you that I have so commented, during either the trial or the giving of these instructions, you must disregard such comment entirely.

NO. 2

Jurors should consult with one another and deliberate with a view to reaching a unanimous verdict, if it can be done without violence to individual judgment. Each of you must decide the case for yourself but only after an impartial consideration of the evidence with your fellow jurors. In the course of deliberations, you should not hesitate to re-examine your own views and change your opinion if you are convinced it is erroneous. However, you should not surrender your honest conviction as to the weight or effect of the evidence solely because of the opinions of your fellow jurors, or for the mere purpose of returning a verdict.

NO. 3

The question you are required to answer is as follows:

> Having in mind the crime of which the defendant has been found guilty, are you convinced beyond a reasonable doubt that there are not sufficient mitigating circumstances to merit leniency?

If you unanimously answer "yes," the sentence will be death. If you unanimously answer "no," or if you are unable to agree on a unanimous answer, the sentence will be life imprisonment without possibility of parole.

In deciding the question posed, the jury may consider any relevant factors, including but not limited to the following:

(1) Whether the age of the defendant at the time of the crime calls for leniency;

(2) Whether the defendant was an accomplice to a murder committed by another person where the defendant's participation in the murder was relatively minor;

(3) Whether the defendant acted under duress or domination of another person.

Life imprisonment without the possibility of release or parole means that: (1) the individual shall not have his sentence suspended, deferred, or commuted by any judicial officer; (2) the Board of Prison Terms and Paroles or its successor shall never parole the individual or reduce the period of confinement; (3) the person shall not be released as a result of any type of good time

calculation; (4) nor shall the Department of Corrections permit the person to participate in any release or furlough program.

NO. 4

During this special sentencing proceeding, the State has the burden of convincing you beyond a reasonable doubt that there are not sufficient mitigating circumstances to merit leniency and that the death penalty should therefore be imposed.

A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly and carefully considering all of the evidence or lack of evidence. If, after such consideration, you have an abiding belief that there are not sufficient mitigating circumstances to merit leniency, you are satisfied beyond a reasonable doubt.

NO. 5

A mitigating circumstance is a fact about either the offense or about the defendant which is fairness or in mercy may be considered as extenuating or reducing the degree of moral culpability or which justifies a sentence of less than death, although it does not justify or excuse the offense.

The appropriateness of the exercise of mercy is itself a mitigating factor you may consider in determining whether the State has proved beyond a reasonable doubt that the death penalty is warranted.

You are also to consider as mitigating circumstances any other factors concerning the defendant that you find to be relevant.

NO. 6

Because you have found the defendant Kwan Fai Mak guilty of aggravated murder, you have been reconvened for this special sentencing proceeding.

It is the foreman's duty to see that discussion is carried on in a sensible and orderly fashion, that the issues submitted for your decision are fully and fairly discussed and that every juror has a chance to be heard and to participate in the deliberations upon each question before the jury.

You will be furnished with all of the exhibits admitted in evidence, these instructions and sentencing verdict form.

You must answer one question. All twelve of you must agree before you answer a question "yes" or "no". When all of you have agreed, fill in the answer to the question in the verdict form to express your decision. When you have filled in the answer called for by the verdict form, the foreman will sign it and notify the bailiff who will conduct you into court to declare your verdict.

You will now listen to the argument of counsel.

/s/Frank D. Howard
JUDGE

[FILED]
[OCTOBER 6, 1983]

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON IN AND FOR THE COUNTY OF KING

STATE OF WASHINGTON,	)	
	)	
Plaintiff,	)	No. 83-1-00504-0
	)	DEPT. 24
vs.	)	
	)	
KWAN FAI MAK,	)	
	)	
Defendant.	)	
	)	

AS TO COUNTS I-XIII

Having in mind the crime of which the defendant has been found guilty, are you convinced beyond a reasonable doubt that there are not sufficient mitigating circumstances to merit leniency?

ANSWER:

[X] "Yes" (In which case the defendant shall be sentenced to death)

[ ] "No" (In which case the defendant shall be sentenced to life imprisonment without possibility of parole)

[ ] "UNABLE TO UNANIMOUSLY AGREE" (In which case the defendant shall be sentenced to life imprisonment without possibility of parole)

/s/ROBERT E. WICKARD
FOREPERSON

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NO. 92-1128

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

JAMES BLODGETT, Superintendent,
Petitioner,
v.
KWAN FAI MAK,
Respondent.

RESPONDENT'S MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Respondent Kwan Fai Mak, through counsel, moves pursuant to Supreme Court Rule 39 for leave to proceed in forma pauperis. The undersigned counsel were appointed by the United States Court of Appeals for the Ninth Circuit under the Criminal Justice Act. Mr. Mak was granted leave to proceed in forma pauperis by the United States District Court on November 9, 1933, and continued that status in the Court of Appeals.

DATED: January 27, 1993.

Respectfully submitted,

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NO. 92-1128

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

JAMES BLODGETT, Superintendent, Petitioner, v. KWAN FAI MAK, Respondent.	AFFIDAVIT OF SERVICE

STATE OF WASHINGTON)
: ss.
County of King)

I, John B. Midgley, a member of the Bar of this Court, hereby certify that on the 27th day of January, 1993, I mailed, first class postage prepaid, one copy of Respondent's Brief In Opposition and one copy of Respondent's Motion To Proceed In Forma Pauperis, to Petitioner's Counsel of Record:

Kathleen D. Mix
Senior Assistant Attorney General
Corrections Division
P.O. Box 40116
Olympia, WA 98504-0116.

I further certify that all parties required to be served have been served.

JOHN B. MIDGLEY, WSBA #6511
Evergreen Legal Services
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SUBSCRIBED AND SWORN TO before me this 27th day of _____, 1993.

BEVERLY S. MILLER
STATE OF WASHINGTON
NOTARY --•-- PUBLIC
My Commission Expires 9-17-96

NOTARY PUBLIC in and for the State of Washington, residing at: _____.
My commission expires: _____

ORIGINAL

NO. 92-1128

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1992

JAMES BLODGETT, Superintendent,

Petitioner,

v.

KWAN FAI MAK,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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KWAN FAI MAK,

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ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

The Respondent Kwan Fai Mak respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Court of Appeals' opinion in this case. That opinion is reported at 970 F.2d 614 (9th Cir. 1992).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Petitioner has not included the full text of the several provisions of the State of Washington's capital punishment statute that are important to an understanding of this case. The key provisions are Wash. Rev. Code. §§ 10.95.020 - 10.95.090, all of which are attached in the Appendix hereto at pp. A-1 to A-8.

STATEMENT OF THE CASE

The state has failed in its petition to acknowledge or

adequately discuss key factual matters. We state these here.[1]

1. Trials And Sentences Of Mr. Mak And His Co-Defendants

As the district court found regarding the three young men who were involved in the crimes in this case:

> Benjamin Ng was tried first and convicted on all counts. He had fired most of the fatal shots. At the penalty phase mitigating evidence was presented in his behalf. The jury did not agree unanimously that the state had proved beyond a reasonable doubt that there were not sufficient mitigating circumstances to merit leniency. Accordingly, Benjamin Ng was sentenced to life in prison without possibility of parole.
>
> [Habeas petitioner Mr. Mak, respondent here] was twenty-two years old at the time of the crime. He had come to this country from Hong Kong at age fifteen, as an immigrant with his family. His trial, before a different jury, followed that of Benjamin Ng. Petitioner's trial also ended in a verdict of guilty on all counts. The prosecution argued, and petitioner denied, that he had planned the crime. In the penalty phase virtually no mitigating evidence was presented in his behalf. The jury found that there were not sufficient mitigating circumstances to warrant leniency. On October 1, 1983, petitioner was sentenced to death.
>
> Tony Ng was the last to be tried. He was captured in Calgary, Alberta, in October, 1984. Because Canada has no capital punishment, had the prosecutor sought the death penalty, Ng's attorneys and Canadian authorities could have resisted extradition. The prosecutor's decision not to seek he death penalty made possible Tony Ng's return to Seattle. He was convicted on thirteen counts of first degree robbery and one count of second degree assault, and was sentenced to seven consecutive life terms in prison.

Mak v. Blodgett, 754 F. Supp. 1490, 1491-1492 (W.D. Wash. 1991), aff'd, 970 F.2d 614 (1992).

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[1]/ The record is cited as follows: The federal district court Clerk's Record papers are cited as "CR" followed by the docket number. The federal district court Reporter's Transcript is cited as "TR" followed by the hearing date and page number. The state court record is consecutively paginated and filed with the federal courts in volumes. That record is cited by volume and then page number as in the following example: "11 REC 3943".

2. The Washington Capital Punishment Statute

Under the Washington capital punishment statute (all relevant sections attached in the Appendix), a separate penalty trial is convened if the defendant is convicted of aggravated first degree murder. At this penalty proceeding the jury must answer the following question:

> Having in mind the crime of which the defendant has been found guilty, are you convinced beyond a reasonable doubt that there are not sufficient mitigating circumstances to merit leniency?

Wash. Rev. Code § 10.95.060(4). "In order to return an affirmative answer to the question posed by this subsection, the jury must so find unanimously." Id. Unless the jury is unanimously convinced that the mitigating circumstances are not sufficient to merit leniency, the sentence is automatically required to be life without possibility of parole. Wash. Rev. Code § 10.95.080(2). Thus, there is no such thing as a "hung jury" on penalty.

Even if convicted of aggravated first degree murder at the guilt phase, a defendant enters the penalty trial with a presumption that he is entitled to leniency, that is a sentence of life without possibility of parole or release. Campbell v. Kincheloe, 829 F.2d 1453, 1466 (9th Cir. 1987), cert. denied, 488 U.S. 948 (1988); State v. Jeffries, 105 Wash.2d 398, 425, 717 P.2d 722, cert. denied, 479 U.S. 922 (1986). Generally speaking, subject to rebuttal evidence, only the defendant's criminal record and mitigating evidence may be introduced in the penalty phase. State v. Bartholomew, 101 Wash.2d 631, 683 P.2d 1079 (1984); Campbell, 829 F.2d at 1462.

3. The Record Regarding Relative Culpability.

The physical evidence showed that 26 of 32 shell casings found at the Wah Mee came from a Ruger .22 automatic pistol. 9 REC 3118-3120. The state has conceded that co-defendant Benjamin Ng, and not Mr. Mak, carried and fired this Ruger, and so therefore did most if not all of the shooting. State's brief on direct appeal, 26 REC 8991-8992; state's Brief in Court of Appeals at 53.

In addition, Mr. Mak testified that he went to the Wah Mee only to administer a beating at the behest of his tong leaders but he had no plan or knowledge that people would be killed. See 9 REC 3262-3306.[2] Mr. Mak was acquitted of the aggravating factor of having a scheme or plan which included murder(19 REC 6886), while co-defendant Benjamin Ng, identified by eyewitness Wai Chin as entering the club separately with the bag of ropes and ordering everyone to raise their hands (18 REC 6520-6523) was convicted by the jury in his trial of the aggravating factor of having planned or schemed the murders (18 REC 6573).

Mr. Mak's court appointed public defenders planned to present, and discussed in opening statement, evidence that Benjamin Ng was connected with one Hing Wong under circumstances showing that Wong wanted to control illegal gambling in Seattle's International District and that he and Ng, unbeknownst to Mr. Mak, may well have planned and set in motion the robbery and consequent killings at the Wah Mee in order to accomplish this. 6 REC 2254-2255. However, the trial court excluded the evidence

---

[2]/ The "tongs" involved are organizations that, among other things, conducted illegal gambling operations and provided protection for those operations. 9 REC 3225.

during the guilt phase. E.g., 8 REC 3767-3785. The trial court refused as well to allow any of this evidence to be presented as mitigating evidence at the penalty phase. 11 REC 4098-4100.[3]

4. Verdict And Penalty Phase

The jury found Mr. Mak guilty of aggravated first degree murder, finding two "aggravating circumstances", i.e. that the murders were committed to conceal the commission of a crime and in furtherance of a robbery. 19 REC 6886. However, as stated above, the jury rejected the charge that the murders were in furtherance of "a common scheme or plan" of Mr. Mak's (Id.), while the jury in the Ben Ng trial had found that the murders were pursuant to a "common scheme or plan" of Ng's. 18 REC 6573.

The penalty phase began about three hours after the aggravated murder verdict was taken. 11 REC 4114.[4] Defense counsel had failed to seek and therefore did not uncover and produce at the penalty phase available mitigating evidence from Mr. Mak's parents and other family members about Mr. Mak's relationships and positive attributes, and expert testimony about his personal and cultural background. Evidentiary hearing, TR 10/30/90 and exhibits admitted at that hearing. The district court found that this "substantial and important mitigating

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[3]/ Tony Ng, the third co-defendant who was tried long after the other two when he was returned from Canada, testified at his own trial. Among other things, he corroborated Mr. Mak's testimony that Mak planned to beat someone up at the Wah Mee in relation to the tong dispute and that murder was not discussed. See 7 Tony Ng REC 2178- 2212. The state's assertion that the Tony Ng testimony "firmly establishes that Mak planned the Wah Mee murders..." (Petition at 24, n. 14) is inaccurate.

[4]/ As the district court found, "the defense lawyers made an informal request, off the record for additional time to prepare for the penalty phase. [Citing CR 306] They failed to make or argue a motion, or do anything else on the record for that purpose." 754 F.Supp. at 1501.

evidence" was "readily available" at the time of trial. 754 F.Supp. at 1496. No family member testified, although many would have had they been asked to provide evidence of Mr. Mak's good qualities. Id. at 1496-1499. The district court also found that "it is clear that counsel failed to present the available mitigating evidence solely through oversight. There was no risk in presenting it. There was no decision on their part to leave it out." Id. at 1500.[5]

Without the "readily available" mitigating evidence regarding Mr. Mak's positive qualities and background, the prosecutor was able to argue in penalty phase summation:

> What separates Willie Mak from the others, is the same thing that distinguishes him from all other murderers, the premeditation of this crime, the intent to kill of this crime, the total absence of fundamental values. There's nothing here to lessen moral culpability.

11 REC 4170-4171 (emphasis added). No evidence to meet this claim was presented by the defense. See also 11 REC 4143-4144, 4166 (prosecutor arguing that Ng verdict and testimony about the vagaries of eyewitness identification -- the sum total of the defense evidence at the penalty phase -- hardly relate to mitigation for Mr. Mak).

The jury instructions given at Mr. Mak's penalty phase trial were different from those given at Benjamin Ng's penalty phase.

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[5]/ The state incorrectly claims that "counsel were aware of many of the items of information Mak has now assembled." Petition at 16. This assertion is without support in the record.

The state also incorrectly questions the district court's strongly supported finding that there was no risk to presenting the missing mitigation evidence. Petition at 7. The district court based the "no risk" finding on the undisputed testimony of both the two trial prosecutors and the two trial defense lawyers. (754 F.Supp. at 1500, quoting and citing testimony), and had before it cross-examination done by the state's lawyers for the evidentiary hearing below, which revealed nothing damaging.

The state successfully proposed a new instruction specifically for the Mak penalty phase that included the language "jurors have a duty to consult with one another and to deliberate with a view to reaching a unanimous verdict ..." (19 REC 6858-6859 (proposal); 19 REC 6881 (instruction given)), even though under Washington law only a death sentence requires a unanimous verdict and a nonunanimous verdict would result in a life sentence. Wash. Rev. Code §§ 10.95.060(4); 10.95.080.

REASONS WHY THE PETITION SHOULD BE DENIED

As is shown below, the Petition fails to accurately describe what the Court of Appeals did in the true context of this case. The actual narrow, factually grounded, per curiam opinion rendered by the Court of Appeals panel (which no active judge in the Circuit thought questionable enough to call for a vote on the question of rehearing en banc) refutes the state's claims about it.

The Court of Appeals granted habeas relief because the trial court prevented the defendant from presenting relevant mitigating evidence to the sentencing jury. The court also found that trial counsel failed to render effective assistance of counsel in the penalty phase of trial and that the trial judge's charge to the jury violated the Constitution, but did not determine whether these latter two claims independently required relief in light of its conclusion that the exclusion of mitigating evidence alone required relief.[6] The state makes no case for review in this

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[6]/ The state claims the Court of Appeals failed to identify the errors that led it to affirm the district court's grant of habeas relief as to sentence. Petition at 10, n. 4. However, the opinion itself makes clear that the Court of Appeals granted relief on the exclusion of evidence ground and also (continued...)

Court of what the Court of Appeals actually did.

I. THE COURT OF APPEALS DECISION REGARDING THE PROHIBITION ON DEFENSE PENALTY PHASE EVIDENCE WAS BASED ON TWO INDEPENDENT GROUNDS; THE PETITION DOES NOT EVEN MENTION ONE OF THE GROUNDS, AND ON THE OTHER THE COURT OF APPEALS MADE A ROUTINE APPLICATION OF SETTLED PRINCIPLES OF THIS COURT'S CAPITAL JURISPRUDENCE.

A. The State Fails To Challenge An Independent Ground For The Decision In The Court of Appeals.

The state fails to mention in the Petition the key point that the Court of Appeals' holding on the exclusion of mitigating evidence at the penalty phase was based on two grounds, each of which the court found "compelling." Mak, 970 F.2d at 624.

As the Court of Appeals recognized, a capital defendant has a constitutional right to present any evidence relating to either the circumstances of the offense or the characteristics of the defendant that might tend to support a sentence less than death, Skipper v. South Carolina, 476 U.S. 1 (1986), and as a close corollary, the Constitution also requires that a capital defendant be permitted to present evidence to rebut the prosecution's evidence and arguments, Skipper, 476 U.S. at 5 n.1 (opinion of the court), 476 U.S. at 9-11 (Powell, J. dissenting except on this point), both citing Gardner v. Florida, 430 U.S. 349 (1977).[7] The Court of Appeals ruled for Mr. Mak on both of these grounds. 970 F.2d at 622-624.

Taking first the second, "rebuttal", ground (ignored by the

---

[6](...continued)
found, but did not attempt to judge prejudice from, serious constitutional problems in the other two area that the state itself complains about in the Petition.

[7]/ Thus, all nine Justices agreed in Skipper that the prosecution's argument at sentencing that Skipper would be violent in prison made his prison record and behavior relevant to sentence.

state), the Court of Appeals correctly recognized that the prosecution made the excluded evidence relevant by insisting that Mak was the only leader:

> Mak also argues that the actions of the prosecutor in painting Mak as the ringleader made the issue of Hing Wong's alleged participation in the massacre relevant, even if it would not otherwise have been. In closing argument, the prosecution said of Mak: "He made the plan and he went out and he carried out the plan, and the job of the defendant was the leader. His job was to oversee everything else that was done by this two crime partners. It was Willie Mak who was in charge. He was not the confused outsider that he would have you believe, but he was the leader of the crime, acting with the motive to commit robbery."
>
> These arguments not only made the issue of Mak's role in the offense relevant, Mak argues, but also gave Mak a due process right to an opportunity to rebut. In Skipper, the Court stated:
>
> > Where the prosecution specifically relies on a prediction of future dangerousness in asking for the death penalty, it is not only the rule of Lockett and Eddings that requires that the defendant be afforded an opportunity to introduce evidence on this point; it is also the elemental due process requirement that a defendant not be sentenced to death "on the basis of information which he had no opportunity to deny or explain."
>
> 476 U.S. at 5 n. 1, 106 S.Ct. at 1671 n. 1 (quoting Gardner v. Florida, 430 U.S. 349, 362, 97 S.Ct. 1197, 1206, 51 L.Ed.2d 393 (1977)).
>
> Under either due process argument, Mak's position is compelling....

Mak, 970 F.2d at 623-624 (emphasis added). This wholly independent ground for the granting of habeas relief as to the penalty phase, unchallenged by the state in its Petition here, completely supports the judgment below.

B. The Court of Appeals Otherwise Applied Settled Precedent On The Exclusion Of Mitigating Evidence At The Penalty Phase.

The state does try to challenge here the other prong of the Court of Appeals' holding on the exclusion of defense evidence. However, the state's claims are unfounded and this holding presents neither any novel application of this Court's decisions

nor any other issue of importance.

The state premises its claims on incorrect statements about what the Court of Appeals did. As a telling example, the state claims that the Court of Appeals's "version of Mak's offer of proof, and the court's analysis of this claim, is derived exclusively from the dissenting opinion ...[in] the Washington Supreme Court." Petition at 18, n.9 (emphasis in original). Every word of this assertion is misleading. Most importantly, the Court of Appeals's analysis of this issue was explicitly based on this Court's opinions:

> Mak argues he had a constitutional right to present all relevant mitigating evidence related to his character or the circumstances of the offense at the sentencing phase of his trial. We agree. The Supreme Court held in Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982), that "the sentencer [may] not be precluded from considering, as a 'mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.'" Id. at 110, 102 S.Ct. at 874 (quoting Lockett, 438 U.S. at 604, 98 S.Ct. at 2965) (emphasis in original). "Equally clear is the corollary rule that the sentencer may not refuse to consider or be precluded from considering 'any relevant mitigating evidence.'" Skipper, 476 U.S. at 4, 106 S.Ct. at 1671 (quoting Eddings, 455 U.S. at 114, 102 S.Ct. at 877). The state does not contest this reading of the law. The issue upon which the parties disagree is whether the evidence is relevant.

Mak, 970 F.2d at 623 (emphasis in original; footnote omitted). The Court of Appeals did agree with the analysis of the dissent in state court, but that is because that dissent, unlike the majority, explicitly relied on this Court's cases regarding admission of defense evidence at the penalty phase. See State v. Mak, 105 Wash. 2d 692, 718 P.2d 407, 424 (majority), 448-450 (dissent), cert. denied, 479 U.S. 995 (1986).

The state's other assertion -- that the Court of Appeals

somehow followed the state dissent in misdescribing the defense's offer of proof in serious deviation from the state court majority's description -- is also incorrect. See the virtually identical descriptions of the defense's offer as set out in, respectively, the Washington Supreme Court majority and dissent. 718 P.2d at 423, 449.

The state does not deny that evidence of a connection between the third party, one Hing Wong, and the Wah Mee incident would be relevant to the death determination in this case; indeed, the state specifically conceded this in oral argument in the Court of Appeals, at which the state's counsel said "I think everybody conceded that had there been evidence that Hing Wong directed this crime that would certainly have been admissible during the guilt phase and during the penalty phase." The state could hardly claim otherwise, given the state's arguments at trial that Mr. Mak was the ringleader and chief planner.[8]

Here, the state's claim is really that "Although Mak showed a connection between Hing Wong and Benjamin Ng, he completely failed to establish any link between Hing Wong and the Wah Mee Massacre" (Petition at 20), and that there exists a reasonable

---

[8]/ The deprivation of Mr. Mak's ability to present this evidence is also notable because the prosecutors and the state courts have tried to justify the death sentence on the claimed basis that Mr. Mak was the planner of the Wah Mee killings. See State's Brief on Appeal, 26 REC 8991-8992 (claiming that the death sentence was justified for Mak when Ben Ng, the main triggerman, got life, because the state thinks Mak was the planner and leader). The Washington Supreme Court found that the death penalty for Mr. Mak was justified when a jury found Ng did not deserve death because, inter alia, there was evidence of Mak's planning. 718 P.2d at 428. Mak's testimony contested this, and the jury acquitted him of the aggravating factor of having a scheme or plan that included murder, yet he was precluded from adducing evidence even in the penalty phase regarding Hing Wong's plans and motives as connected to Wah Mee.

state court evidentiary ruling adequately accounting for constitutional rights along with state court findings of historical fact to support this to which the Court of Appeals did not show sufficient deference (Petition at 19, 23). Each premise of this alleged basis for review in this Court is flatly wrong.

First, trial counsel repeatedly demonstrated evidence of a clear connection between Hing Wong and the Wah Mee through the statement made to police by an informant:

> But for the connection, though, there is that indication from confidential informant number 30, indicating that Hing Wong ... , the informant indicated to Lieutenant Holter was the one that put Mak and Ng up to this...

10 REC 3781. The police deemed this information "from this informant that there was an individual directing the actions of the people inside the Wah Mee club, directing them to kill the people in the Wah Mee...sufficiently important to do follow-up on the information that was given ... by C.I. 30" (quotation from question from counsel at pretrial hearing, answered "Yes" by police lieutenant, 2 REC 485-486).

This evidence, though it was hearsay (not speculation as claimed by the state), would clearly have been admissible under the Washington rule -- conceded but not revealed to its true extent by the state in the Petition at 22 -- that the rules of evidence do not apply to mitigation evidence:

> The court [at a capital sentencing proceeding] shall admit any relevant evidence which it deems to have probative value regardless of its admissibility under the rules of evidence, including hearsay evidence...

Wash. Rev. Code § 10.95.060(3) (pertinent part). The Washington Supreme Court in State v. Bartholomew, 98 Wash. 2d 173, 654 P.2d 1170 (1982)(Bartholomew I), vacated and remanded for

reconsideration, 463 U.S. 1203 (1983), reaffirmed, 101 Wash. 2d 631, 683 P.2d 1079 (1984)(Bartholomew II) has emphasized that this means there are significantly relaxed standards of both reliability and relevance:

> Defendant's right to present mitigating evidence is limited only by the requirement of relevance. The Rules of Evidence designed to ensure the reliability of evidence received by the court do not apply to mitigating information in a capital sentencing proceeding.

Bartholomew I, 654 P.2d at 1184 (emphasis added); first sentence quoted in Bartholomew II, 683 P.2d at 1087.

> Therefore, only evidence which is not probative or not relevant is excluded at the sentencing phase. With regard to mitigating circumstances, less restrictive standards for relevance and probative value are applied to exclude evidence at the sentencing phase than at the guilt phase.

Bartholomew II, 683 P.2d at 1088 (emphasis added).

The state fails as well to acknowledge other items of evidence admissible at penalty that would support the connections defense counsel sought to show. For example, the state claims that Hing Wong's plan to control gambling in the International District included "no talk about forcible robbery..." (Petition at 20-21). This overlooks the statement given to police by Andy Wong, who stated that robbery and terror were indeed contemplated. 8 REC 3055. The prosecution conceded that such "impeachment" existed (10 REC 3780), but, importantly, at the penalty phase this would have been directly admissible hearsay. Moreover, the state even misleads regarding Steve Chin's testimony: the state suggests Chin said that Hing Wong talked only about "showing muscle" (Petition at 20), but Chin's testimony actually describes a more dangerous approach:

> . . . they wanted to go in and show muscle, you know,

show the guns and show them that they do mean business. 10 REC 3770 (emphasis added). The state also conveniently overlooks testimony from Chin that Benjamin Ng, who shot most of the people at the Wah Mee, was indebted to and devoted to Hing Wong. 10 REC 3771-3773. Further, despite the state's suggestion that Ben Ng and Hing Wong could not be proven to have been "in contact . . . on the day of the Wah Mee murders" (Petition at 21), the prosecutor at trial admitted "There was contact [on that day], that was the extent of it, there are witnesses who would say that." 10 REC 3783.

Thus, the state is wrong to suggest that Mr. Mak had no "actual evidence" (Petition at 24; emphasis in original). Rather, the state just refuses to acknowledge the evidence Mr. Mak did have.

Second, the state's premise that Mr. Mak somehow had to conclusively "establish" a link between Wong and the Wah Mee before the evidence could become relevant and go to the jury betrays a much too restrictive understanding of "relevance":

> "[I]t is universally recognized that evidence, to be relevant to an inquiry, need not conclusively prove the ultimate fact in issue, but only have 'any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." New Jersey v. T.L.O., 469 U.S. 325, 345 (1985), quoting Fed. Rule Evid. 401. The meaning of relevance is no different in the context of mitigating evidence introduced in a capital sentencing proceeding. As the Chief Justice of the North Carolina Supreme Court stated in dissent in this case:
>
> > "Relevant mitigating evidence is evidence which tends logically to prove or disprove some fact or circumstance which a fact-finder could reasonably deem to have mitigating value. Whether the fact-finder accepts or rejects the evidence has no bearing on the evidence's relevancy. The relevance exists even if the fact-finder fails to be persuaded by that evidence. It

> is not necessary that the item of evidence alone convinces the trier of fact or be sufficient to convince the trier of fact of the truth of the proposition for which it is offered." 323 N.C. at 55-56, 372 S.E. 2d, at 45 (Exum, C.J., dissenting), citing M. Graham, Handbook of Federal Evidence §401.1, n.12 (2d ed. 1986).

McKoy v. North Carolina, 494 U.S. 433, 440 (1990). In Washington, of course, "the fact-finder", indeed the final sentencer, is the jury. Wash. Rev. Code §10.95.080.

Significantly, in a Washington penalty phase, Mr. Mak did not have to prove mitigating circumstances by a preponderance, or indeed affirmatively prove anything. The state had to prove beyond a reasonable doubt the absence of sufficient mitigating circumstances. Wash. Rev. Code § 10.95.060(4). Thus, any evidence that would tend to raise a reasonable doubt as to culpability would be relevant.

Third, the state is incorrect in suggesting that the Washington Supreme Court majority adequately dealt with Mr. Mak's constitutional rights at a capital sentencing procedure. The state court majority incorrectly melded the distinct issues regarding exclusion of evidence at the guilt and penalty phases under merely an "abuse of discretion" standard:

> ISSUE ELEVEN. Did the trial court err in excluding, at both the guilt and penalty phases of the trial, evidence concerning a claimed accomplice of the defendant?
>
> CONCLUSION. The trial court did not abuse its discretion in excluding the testimony.

718 P. 2d at 423 (emphasis added). The majority analyzed in some detail the guilt phase question whether one can show at a normal criminal trial that another person was actually the perpetrator. 718 P.2d at 423-424. However, the majority then "resolved" the penalty phase claim in three short paragraphs without citation to

any United States Supreme Court case, saying only that "the defendant's proffered evidence in this regard was neither relevant nor probative". 718 P.2d at 424.[9]

Finally, the state's claim that the state court majority rejected Mr. Mak's penalty phase evidence claim on purely factual grounds is not right, either. The state concedes that "the ultimate determination of relevance would be characterized as a mixed question of fact and law..." (Petition at 19) (and therefore is subject to plenary review in federal court, Cuyler v. Sullivan, 446 U.S. 335, 341-342 (1980)). In spite of this abstract recognition that relevance is a legal issue, the state neglects to acknowledge that the Washington Supreme Court majority's penalty phase ruling was nothing but a conclusion on relevance. See entire penalty phase analysis quoted here at

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[9]/ Here is the entire analysis of the majority with respect to the penalty phase:

> During the special sentencing proceeding, the defendant again offered this same evidence, and again, the trial court excluded the evidence on relevancy grounds.
>
> Defendant argues that in light of our holding in State v. Bartholomew, 101 Wash.2d 631, 645, 683 P.2d 1079 (2984) (Bartholomew II), the evidence should at least have been admitted in that phase of the trial. However, as Bartholomew II pointed out:
>
> > The Washington capital punishment statute requires admission at the sentencing phase of "any relevant evidence which it deems to have probative value regardless of its inadmissibility under the rules of evidence ..." RCW 10.95.060(3). We have restricted this provision to evidence in mitigation of punishment. *Therefore, only evidence which is not probative or not relevant is excluded at the sentencing phase.*
>
> (Italics ours.)
>
> The defendant's proffered evidence in this regard was neither relevant nor probative.

718 P.2d at 424 (footnote omitted).

n. 9.[10]

The Court of Appeals' case-specific conclusion on this record was simply that under settled constitutional law Mr. Mak had a right to present "at the penalty phase circumstantial evidence from which it might be inferred that Mak's co-defendant, Ben Ng, and a third party, Hing Wong, rather than Mak, may have planned the massacre." Mak, 970 F.2d at 622 (footnote omitted). This unremarkable holding does not merit this Court's review.

II. THE COURT OF APPEALS' INEFFECTIVE ASSISTANCE DISCUSSION WAS MADE IN EXPLICIT CONFORMITY WITH STRICKLAND V. WASHINGTON AND THE CIRCUIT DID NOT PRESUME INEFFECTIVENESS OR OTHERWISE CONDUCT IMPROPER REVIEW.

A. The Court of Appeals, Far From "Presuming" Deficient Performance, Found That Based On The Detailed Record In This Case, Counsel's Performance At The Penalty Phase Fell Below An Objective Standard Of Reasonableness.

The circuit and district courts found that trial counsel in this capital case who 1) failed to conduct an investigation into their client's personal history and, 2) who failed even to communicate to their client's Chinese speaking parents, that they were their son's lawyers and not police (Evidentiary Hearing Ex. 2) and, 3) as a result of failing to look, failed to uncover a

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[10]/ The state tries to tease "factual findings" from the quotation on page 19 of the Petition and then claim that these are the "findings" that should have been given deference under 28 U.S.C. §2254(d). However, this quotation is from the state court majority's discussion of admissibility at the guilt phase made without consideration of penalty phase constitutional jurisprudence. Moreover, the majority's guilt phase discussion quoted contains a legal conclusion that there was a connection between Hing Wong "and the crimes at the Wah Mee" shown by one item of the proposed evidence (a connection the state itself disagrees with the state court majority about, Petition at 21 n.12). The majority found that item inadmissible at the guilt phase only because it was hearsay, but this does not bolster the penalty phase ruling because of course hearsay is admissible in the penalty phase. With respect to the penalty phase, the majority discussed none of the proposed evidence, even this item that concededly showed a connection between Wong and Wah Mee.

volume of favorable mitigation evidence,[11] and who 4) entered the penalty phase having obtained no favorable or sympathetic evidence about their client, even though such evidence was readily available,[12] fell below minimum standards of performance in a capital penalty hearing.[13] The circuit court summarized the penalty hearing: "Mak was depicted by the prosecution as a killing machine, and the defense presented no humanizing evidence whatsoever to offset that picture." Mak, 970 F.2d at 619.

The circuit and district courts did not depart in any way from the standard set forth in Strickland:

> ...counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.

Strickland v. Washington, 466 U.S. 668, 691 (1984).

Trial counsel testified at the evidentiary hearing, and the

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[11]/ The mitigating testimony of Mr. Mak's mother, father, brother, sister-in-law, nephew, and an expert on Chinese culture and Chinese immigrants, are partially set forth or summarized in the district court opinion. 754 F. Supp. at 1496-1499.

[12]/ The state tries here, as it has tried before, to imply that there was some risk to presenting evidence that Respondent had good and decent aspects to his life, Petition at 17. As shown above at p. 6, n. 5, this claim is unfounded.

[13]/ The only item of evidence obtained by trial counsel in preparation for the penalty phase of Mr. Mak's trial was the verdict form from co-defendant Ben Ng's trial which showed Ng was sentenced to life imprisonment without parole or release.

The expert testimony regarding eye-witness identification was intended by trial counsel for the guilt phase but was excluded by the trial court. Obviously, this testimony had nothing to do with the personal characteristics of the defendant.

The testimony regarding the leadership of an uncharged person, Hing Wong, in the crimes was also originally intended by trial counsel for the guilt phase, as shown by defense counsel's opening argument, but was excluded by from both phases by the trial court. See Statement Of The Case at pp. 4-6 above.

district court found, after personally interrogating trial counsel, that there was no tactical reason for counsel's failure to obtain and present the available favorable mitigating evidence. An expert witness testified in the district court that trial counsel's preparation and conduct of the penalty phase did not meet reasonable standards of defense. E.g., Ex. 17, pages 29-34.[14] The state presented no countervailing testimony that counsels' performance was reasonable in this case, and so the record before the lower courts was devoid of any testimony that trial counsel did meet "prevailing professional norms" for defense at a capital sentencing proceeding.

This is clearly a fact-based decision that on this record counsel's mitigation investigation and presentation was deficient. Instead of presuming deficient performance for failure to present mitigating evidence, the Court of Appeals was express in noting other circumstances, including other Court of Appeals cases and Strickland v. Washington, in which trial counsel's failure to present mitigating evidence was reasonable:

> In prior Supreme Court and Ninth Circuit cases dealing with failure to admit mitigating evidence where performance has been found reasonable, the attorneys had consciously decided not to present mitigating evidence because of reasonable tactical evaluations - specifically, they determined the evidence would have opened the door to damaging rebuttal evidence.

Mak, 970 F.2d at 618-619 (emphasis added; footnote citing cases omitted).

This Court has ruled:

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[14]/ This expert witness, Richard Cease, has been the director of the Spokane, Washington, Public Defenders Office for over twenty years, has tried several capital cases, and has been charged with the supervision and training of public defender staff attorneys for his entire public defender career.

> ...a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of a particular case, viewed as of the time of counsel's conduct.

Strickland, 466 U.S. at 690. In the instant case, the lower courts did precisely that and nothing else.

B. The Courts Below Discussed The Prejudice Standard In The Context Of The Governing State Law.

This Court directed in Strickland:

> In making the determination whether the specified errors resulted in the required prejudice, a court should presume... that the judge or jury acted according to law... The assessment of prejudice should proceed on the assumption that the decision maker is reasonably, conscientiously, and impartially applying the standards that govern the decision...
>
> The governing legal standard plays a critical role in defining the question to be asked in assessing the prejudice for counsel's errors...

466 U.S. at 694-695. It could not be more clear that in determining prejudice, that is in determining whether "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different", (Strickland, 466 U.S. at 694) the courts must determine whether the results were likely to have been different under the governing state law.

Under Washington law, which governed the penalty phase of Mr. Mak's trial, the results would have been different, a death sentence would not have been imposed, if the state failed to convince the jury unanimously beyond a reasonable doubt that there were not sufficient mitigating circumstances to merit leniency.[15] The governing law recognizes two possible verdicts,

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[15]/ The reviewing court would be required to consider the probable effect of the "potentially powerful" mitigating evidence here given the statutory presumption that sufficient mitigating (continued...)

"yes" the jury is unanimously convinced that there are not sufficient mitigating circumstances to merit leniency, and "no" the jury is not unanimously convinced that there are not sufficient mitigating circumstances to merit leniency.[16] Under this scheme, there is no such thing as a hung jury, no such thing as a hold out juror. In the context of this law, the courts are required in determining prejudice under Strickland to consider the reasonable probability that had counsel performed adequately one or more jurors would have in following the law failed to be convinced of the absence of sufficient mitigating circumstances to merit leniency.

That is exactly what the lower courts did here. The Court of Appeals approved the district court's holding that had trial counsel, rather than depriving their client of the right to present mitigating evidence, instead had properly gathered and presented mitigation evidence, this

> very well might have [changed the outcome] - especially since the death penalty could not be imposed if even one juror was not convinced beyond a reasonable doubt that it should be. There is thus a reasonable probability that, but for the deprivation of counsel's effective assistance at the penalty phase, the result would have been different.

754 F. Supp. at 1501 (emphasis added). The lower courts thus merely used Washington law's implicit provision that reasonable

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[15](...continued)
circumstances exist to merit leniency (State v. Jeffries, supra), and that the presumption of leniency alone may raise a reasonable doubt as to whether the state has proven an absence of mitigation sufficient to merit leniency. Campbell v. Kincheloe, 829 F.2d 1453 at 1466.

[16]/ The instant case was confused when the Court allowed a third verdict option for penalty jury, a unanimous "no". There is no authority under the Washington statute for the Court to inquire whether the jury is unanimous against the death penalty.

doubt in one or more lawfully acting jurors prohibits a death sentence to inform the reasonable probability analysis.

The state's claim that the "'effect on one juror' approach is a significant reduction of a defendant's affirmative burden under Strickland to prove actual prejudice," Petition at p. 12, is simply not true. As seen above, Strickland requires that prejudice must be assessed with a presumption of lawful juror behavior under the specific state law governing the proceedings in a determination of whether counsels' deficient performance prejudiced the client. The Court of Appeals followed the Strickland procedure.

Nor could the lower courts' analysis have a broader application than was intended by Strickland. When Strickland refers to a reasonable probability that without counsel's error the result would be different, it means a different verdict, not a lack of a verdict and mistrial. The probability that a non-unanimous jury would have resulted (what the state calls the "effect on one juror" approach) is a proper determination for a reviewing court only under a statute in which non-unanimity results in a final verdict, such as the Washington death penalty statute. There is nothing new or novel in the lower courts' application of the Strickland prejudice analysis under the state law which governed the proceedings.

C. The Court of Appeals Properly Approved Consideration Of The Circumstances of Co-Defendant Benjamin Ng's Case On The Question Of Prejudice.

The state makes the bold claim that the Court of Appeals "improperly inserted a sentence proportionality review into the Strickland analysis...", Petition at p. 13. This is false. As the state admits in a footnote, the lower courts expressly

rejected Respondent's claim that his death sentence was disproportionate to his co-defendant's life sentence:

> "The constitution does not require a general proportionality review in death penalty cases. See Pulley v. Harris, 465 U.S. 37, 43-44 (1984). None of the cases cited by Mak support the proposition that the eighth amendment requires that co-defendants convicted of the same crime receive the same sentence. The disparity in sentences in this instance may be explained by the fact that the Ng [co-defendant's] jury was presented with evidence of mitigating circumstances, while the Mak jury was not, a matter dealt with in the published portion of this disposition." Unpublished memorandum decision, Appendix to the Petition at p. B-21.

However, Pulley v. Harris has nothing to do with how a court may determine the existence of prejudice in a case of ineffective counsel under the Sixth Amendment.

In determining whether counsel's deficient performance has prejudiced a defendant, this Court requires:

> The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.

Strickland, 466 U.S. at 694. In meeting this burden, nothing in Strickland prohibited Respondent from directing the court's attention to the fact that his co-defendant who was convicted of the identical crimes, found to have planned the crime, and is admitted by the state to be the main triggerman, produced mitigating evidence and received a life sentence. Nothing in Strickland requires a court to function in a vacuum.

Both of the lower courts considered the success of mitigation evidence in the co-defendant's case as only part of the prejudice analysis. More important in both courts was the fact that the mitigation evidence undiscovered by trial counsel would have moderated the penalty phase argument of the prosecutor:

> What separates Willie Mak from the others, is the same thing that distinguishes him from all other murderers, the premeditation of this crime, the total absence of fundamental values. There's nothing here to lessen moral culpability.

The district court found the omission of evidence of Respondent's positive traits, cultural influences, and wholesome family relationships prejudicial because that is precisely the evidence which was reasonably likely to have raised a reasonable doubt against the state's argument that Respondent was totally lacking in "fundamental values." A reasonable doubt is all that was necessary to change the outcome of Respondent's sentencing trial.

The Court of Appeals did not definitively rule on prejudice (because habeas relief was found necessary on the "exclusion of evidence" ground), thus presenting no issue for review here, but in any event there was no discernible problem with the Court of Appeals statement that "On the whole, we cannot find fault with the district court's prejudice analysis." 970 F.2d at 621.

III. THE COURT OF APPEALS CORRECTLY IDENTIFIED THE IMPORTANT CONSTITUTIONAL PROBLEMS WITH THE "UNANIMITY" INSTRUCTIONS FROM RESPONDENT'S PENALTY PHASE, BUT DID NOT REST ITS JUDGMENT ON THE PLAIN DEFECTS IN THOSE INSTRUCTIONS.

The state has grossly mischaracterized the Court of Appeals' opinion regarding instructional error. The court below correctly identified Mr. Mak's claim,

> Mak argues that the court's jury instructions and verdict form erroneously encouraged the jury to reach a unanimous verdict on all issues. Because the death penalty was the only issue that required a unanimous verdict, Mak alleges that this encouragement of unanimity necessarily encouraged jurors to vote for the death penalty and was contrary to law.

970 F.2d at 622.

Under the Washington statute which recognizes only two

verdicts -- "yes" the jury is unanimously convinced the state has proven an absence of sufficient mitigating circumstances to merit leniency and "no" the jury is not unanimously convinced -- the circuit found the trial court misstated the law to the defendant's detriment in instructing the jury "...All twelve of you must agree before you answer a question "yes" or "no". When all of you have agreed fill in the answer to the question in the verdict form to express your decision..." (Instruction 6), and in further instructing the jury to "deliberate with a view toward reaching a unanimous verdict..." (Instruction 2).[17] The Court of Appeals found the instructions not to be ambiguous but to affirmatively misstate the statutory law and concluded, "Challenged instructions number 2, 3 and the verdict form combined to improperly emphasize to the jury that unanimous agreement was required not to impose the death penalty...There is no question that challenged instruction number 6 was an erroneous statement of the law." 970 F.2d at 625.[18]

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[17]/ Contrary to the suggestion in the Petition at 28, the Washington Supreme Court did not expressly apply the death penalty statute to instructions 2 and 6. The state court did not mention Wash. Rev. Code §10.95.080(2) providing that the sentence shall be life imprisonment if the jury fails to return an affirmative answer to the statutory question, and it mentioned Wash. Rev. Code §10.95.080(4) only to reference the statutory sentencing question. Thus the circuit court could only look to the clear language of the Washington statute to derive that statute's meaning.

[18]/ The state completely omits from its petition discussion of penalty phase instruction no. 2 which directed the jury to "deliberate with a view to reaching a unanimous verdict..." The state must be aware, as was the Court of Appeals, that under Washington law that instruction is tantamount to directing the jury to "deliberate with a view to reaching a death verdict..." because only an affirmative answer to the statutory question, which results in a death sentence, requires unanimity. The state should also be fully aware that no other instruction nor the instructions read as a whole contained any language which

(continued...)

The Court of Appeals did no more than acknowledge here the problem recently discussed by Justice Scalia with reference to Mills v. Maryland, 486 U.S. 367 (1988):

> Whether or not Maryland law could constitutionally require unanimity, the Court of Appeals authoritatively determined that it did not do so; and a death sentence based upon an erroneous instruction to that effect would have to be set aside. Justice BLACKMUN is correct that "ambiguous jury instructions, even in a capital case, do not violate the Eighth Amendment simply because they are ambiguous," [citation omitted], but they do violate the Due Process Clause if they misstate the law to the defendant's detriment - and it is not essential to that violation that the law as misstated be an unconstitutional law.

McKoy v. North Carolina, 494 U.S. at 459, n. 1, Scalia, J. dissenting (first emphasis in original; second added).

The Court of Appeals did not abandon the criteria of Boyde v. California, 494 U.S. 370 (1990) for reviewing jury instructions. In quoting the prejudice analysis of Kubat v. Thieret, 867 F.2d 351 (7th Cir. 1987), cert. denied, 479 U.S. 995 (1989) the Court of Appeals made reference to the reasonable probability test for determining prejudice on a claim of ineffective counsel. Of course, as made clear in Boyde itself, the "reasonable probability" prejudice standard for ineffective assistance claims is the same as the Boyde "reasonable likelihood" (that an instruction would be applied in an unconstitutional way) standard for judging jury instructions. Boyde, 494 U.S. at 380, n. 4, citing Strickland. Thus the state

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[18](...continued)
would inform the jury that a unanimous verdict was not strongly preferred by the Court. To the contrary, instruction no. 6, increased the pressure to reach a unanimous verdict by commanding the jury, "...All twelve of you must agree before you answer a question "yes" or "no". When all of you have agreed, fill in the answer to the question in the verdict form to express your decision." Emphasis added.

complains (Petition at 28, n. 20) about the application of what is in effect the Boyde standard.[19]

The Court of Appeals did not determine whether the prejudice created by penalty phase "unanimity" jury instructions was sufficient alone to require reversal of Respondent's death sentence because the erroneous exclusion of relevant mitigating evidence offered by the defendant itself required reversal of Respondent's death sentence. See 970 F.2d at 624, 625. In this sense, the Court's determination of the instruction claim was superfluous to its disposition of the case but was included so as to helpfully identify a constitutional error for the parties and trial court to avoid at any new sentencing proceeding.[20]

Unlike the state, which discusses only part of one instruction, No. 6, the Court of Appeals' carefully set forth pertinent language from and considered three jury instructions, which were all the instructions dealing in any way with the

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[19]/ Discussing a challenged instruction this Court stated in Boyde:

> The instruction is not concededly erroneous, nor found so by a court...The claim is that the instruction is ambiguous and therefore subject to an erroneous interpretation. We think the proper inquiry in such a case is whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence.

494 U.S. at 380 (citation omitted). The Boyde standard is to be used to interpret ambiguous instructions. The Court of Appeals in this case did apply but actually had no need to apply the Boyde standard because instead of considering whether the instructions were ambiguous and reasonably likely to be applied in an unconstitutional way, the court found that the challenged instructions unambiguously misstated the law.

[20]/ Instructions similar to those found erroneous in this case have not been routinely given in capital cases in Washington. Subsequent to Respondent's trial uniform jury instructions for capital sentencing hearings have been adopted and do not include similar instructions.

unanimity or non-unanimity of the jury (numbers 2, 3 and 6),[21] and also set forth and considered the verdict form. 970 F.2d at 624. Furthermore, unlike the state, the circuit court carefully considered the applicable death penalty law and the manner in which the prosecutor used the challenged instructions in argument to the jury.[22] Far from considering the instructions in isolation (Petition at 25), the court below could have done no more to put the instructions in context.

CONCLUSION

For the foregoing reasons the petition for writ of certiorari should be denied.

DATED: January 27, 1993.

Respectfully submitted,

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[21]/ The Court gave only six penalty instructions in total. Instruction 1 was the general introductory instruction, No. 4 explained the burden of proof and reasonable doubt, No. 5 defined "mitigating circumstance".

[22]/ The Court had before it the penalty phase closing argument of the prosecutor which falsely suggested to the jury that it had a duty to be unanimous in the penalty phase equal to its duty to be unanimous in the guilt phase of the trial. The prosecutor said as his nearly last word before the jury retired to determine the sentencing question: "You have an instruction here that jurors should consult with one another and deliberate with a view of reaching a unanimous verdict if it can be done without violence to individual judgment. You've already deliberated through a case once, so you know what that's all about..." 11 REC 4172.

EDITOR'S NOTE

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APPENDIX

10.95.020. Aggravated first degree murder defined

A person is guilty of aggravated first degree murder if he or she commits first degree murder as defined by RCW 9A.32.030(1)(a), as now or hereafter amended, and one or more of the following aggravating circumstances exist:

(1) The victim was a law enforcement officer, corrections officer, or fire fighter who was performing his or her official duties at the time of the act resulting in death and the victim was known or reasonably should have been known by the person to be such at the time of the killing;

(2) At the time of the act resulting in the death, the person was serving a term of imprisonment, had escaped, or was on authorized or unauthorized leave in or from a state facility or program for the incarceration or treatment of persons adjudicated guilty of crimes;

(3) At the time of the act resulting in death, the person was in custody in a county or county-city jail as a consequence of having been adjudicated guilty of a felony;

(4) The person committed the murder pursuant to an agreement that he or she would receive money or any other thing of value for committing the murder;

(5) The person solicited another person to commit the murder and had paid or had agreed to pay money or any other thing of value for committing the murder;

(6) The victim was:

(a) A judge; juror or former juror; prospective, current, or former witness in an adjudicative proceeding; prosecuting attorney; deputy prosecuting attorney; defense attorney; a member of the board of prison terms and paroles;[1] or a probation or parole officer; and

(b) The murder was related to the exercise of official duties performed or to be performed by the victim;

(7) The person committed the murder to conceal the commission of a crime or to protect or conceal the identity of any person committing a crime;

(8) There was more than one victim and the murders were part of a common scheme or plan or the result of a single act of the person;

(9) The murder was committed in the course of, in furtherance of, or in immediate flight from one of the following crimes:

(a) Robbery in the first or second degree;

(b) Rape in the first or second degree;

(c) Burglary in the first or second degree;

(d) Kidnapping in the first degree; or

(e) Arson in the first degree;

(10) The victim was regularly employed or self-employed as a news reporter and the murder was committed to obstruct or hinder the investigative, research, or reporting activities of the victim.

10.95.030. Sentences for aggravated first degree murder

(1) Except as provided in subsection (2) of this section, any person convicted of the crime of aggravated first degree murder shall be sentenced to life imprisonment without possibility of release or parole. A person sentenced to life imprisonment under this section shall not have that sentence suspended, deferred, or commuted by any judicial officer and the board of prison terms and paroles[1] or its successor may not parole such prisoner nor reduce the period of confinement in any manner whatsoever including but not limited to any sort of good-time calculation. The department of social and health services or its successor or any executive official may not permit such prisoner to participate in any sort of release or furlough program.

(2) If, pursuant to a special sentencing proceeding held under RCW 10.95.050, the trier of fact finds that there are not sufficient mitigating circumstances to merit leniency, the sentence shall be death.

10.95.040. Special sentencing proceeding—Notice—Filing—Service

(1) If a person is charged with aggravated first degree murder as defined by RCW 10.95.020, the prosecuting attorney shall file written notice of a special sentencing proceeding to determine whether or not the death penalty should be imposed when there is reason to believe that there are not sufficient mitigating circumstances to merit leniency.

(2) The notice of special sentencing proceeding shall be filed and served on the defendant or the defendant's attorney within thirty days after the defendant's arraignment upon the charge of aggravated first degree murder unless the court, for good cause shown, extends or reopens the period for filing and service of the notice. Except with the consent of the prosecuting attorney, during the period in which the prosecuting attorney may file the notice of special sentencing proceeding, the defendant may not tender a plea of guilty to the charge of aggravated first degree murder nor may the court accept a plea of guilty to the charge of aggravated first degree murder or any lesser included offense.

(3) If a notice of special sentencing proceeding is not filed and served as provided in this section, the prosecuting attorney may not request the death penalty.

10.95.050. Special sentencing proceeding—When held—Jury to decide matters presented—Waiver—Reconvening same jury—Impanelling new jury—Peremptory challenges

(1) If a defendant is adjudicated guilty of aggravated first degree murder, whether by acceptance of a plea of guilty, by verdict of a jury, or by decision of the trial court sitting without a jury, a special sentencing proceeding shall be held if a notice of special sentencing proceeding was filed and served as provided by RCW 10.95.040. No sort of plea, admission, or agreement may abrogate the requirement that a special sentencing proceeding be held.

(2) A jury shall decide the matters presented in the special sentencing proceeding unless a jury is waived in the discretion of the court and with the consent of the defendant and the prosecuting attorney.

(3) If the defendant's guilt was determined by a jury verdict, the trial court shall reconvene the same jury to hear the special sentencing proceeding. The proceeding shall commence as soon as practicable after completion of the trial at which the defendant's guilt was determined. If, however, unforeseen circumstances make it impracticable to reconvene the same jury to hear the special sentencing proceeding, the trial court may dismiss that jury and convene a jury pursuant to subsection (4) of this section.

(4) If the defendant's guilt was determined by plea of guilty or by decision of the trial court sitting without a jury, or if a retrial of the special sentencing proceeding is necessary for any reason including but not limited to a mistrial in a previous special sentencing proceeding or as a consequence of a remand from an appellate court, the trial court shall impanel a jury of twelve persons plus whatever alternate jurors the trial court deems necessary. The defense and prosecution shall each be allowed to peremptorily challenge twelve jurors. If there is more than one defendant, each defendant shall be allowed an additional peremptory challenge and the prosecution shall be allowed a like number of additional challenges. If alternate jurors are selected, the defense and prosecution shall each be allowed one peremptory challenge for each alternate juror to be selected and if there is more than one defendant each defendant shall be allowed an additional peremptory challenge for each alternate juror to be selected and the prosecution shall be allowed a like number of additional challenges.

10.95.060. Special sentencing proceeding—Jury instructions—Opening statements—Evidence—Arguments—Question for jury

(1) At the commencement of the special sentencing proceeding, the trial court shall instruct the jury as to the nature and purpose of the proceeding and as to the consequences of its decision, as provided in RCW 10.95.030.

(2) At the special sentencing proceeding both the prosecution and defense shall be allowed to make an opening statement. The prosecution shall first present evidence and then the defense may present evidence. Rebuttal evidence may be presented by each side. Upon conclusion of the evidence, the court shall instruct the jury and then the prosecution and defense shall be permitted to present argument. The prosecution shall open and conclude the argument.

(3) The court shall admit any relevant evidence which it deems to have probative value regardless of its admissibility under the rules of evidence, including hearsay evidence and evidence of the defendant's previous criminal activity regardless of whether the defendant has been charged or convicted as a result of such activity. The defendant shall be accorded a fair opportunity to rebut or offer any hearsay evidence.

In addition to evidence of whether or not there are sufficient mitigating circumstances to merit leniency, if the jury sitting in the special sentencing proceeding has not heard evidence of the aggravated first degree murder of which the defendant stands convicted, both the defense and prosecution may introduce evidence concerning the facts and circumstances of the murder.

(4) Upon conclusion of the evidence and argument at the special sentencing proceeding, the jury shall retire to deliberate upon the following question: "Having in mind the crime of which the defendant has been found guilty, are you convinced beyond a reasonable doubt that there are not sufficient mitigating circumstances to merit leniency?"

In order to return an affirmative answer to the question posed by this subsection, the jury must so find unanimously.

10.95.070. Special sentencing proceeding—Factors which jury may consider in deciding whether leniency merited

In deciding the question posed by RCW 10.95.060(4), the jury, or the court if a jury is waived, may consider any relevant factors, including but not limited to the following:

(1) Whether the defendant has or does not have a significant history, either as a juvenile or an adult, of prior criminal activity;

(2) Whether the murder was committed while the defendant was under the influence of extreme mental disturbance;

(3) Whether the victim consented to the act of murder;

(4) Whether the defendant was an accomplice to a murder committed by another person where the defendant's participation in the murder was relatively minor;

(5) Whether the defendant acted under duress or domination of another person;

(6) Whether, at the time of the murder, the capacity of the defendant to appreciate the wrongfulness of his or her conduct or to conform his or her conduct to the requirements of law was substantially impaired as a result of mental disease or defect;

(7) Whether the age of the defendant at the time of the crime calls for leniency; and

(8) Whether there is a likelihood that the defendant will pose a danger to others in the future.

10.95.080. When sentence to death or sentence to life imprisonment shall be imposed

(1) If a jury answers affirmatively the question posed by RCW 10.95.060(4), or when a jury is waived as allowed by RCW 10.95.050(2) and the trial court answers affirmatively the question posed by RCW 10.95.060(4), the defendant shall be sentenced to death. The trial court may not suspend or defer the execution or imposition of the sentence.

(2) If the jury does not return an affirmative answer to the question posed in RCW 10.95.060(4), the defendant shall be sentenced to life imprisonment as provided in RCW 10.95.030(1).

10.95.090. Sentence if death sentence commuted, held invalid, or if death sentence established by chapter held invalid

If any sentence of death imposed pursuant to this chapter is commuted by the governor, or held to be invalid by a final judgment of a court after all avenues of appeal have been exhausted by the parties to the action, or if the death penalty established by this chapter is held to be invalid by a final judgment of a court which is binding on all courts in the state, the sentence for aggravated first degree murder if there was an affirmative response to the question posed by RCW 10.95.060(4) shall be life imprisonment as provided in RCW 10.95.030(1).